LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 15 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 556

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WHITE OAK COAL COMPANY, INC.

PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

E. H. RAYSON
R. R. KRAMER
904 Burwell Building
Knoxville, Tennessee

WILLARD P. OWENS
900 Fifteenth Street, N. W.
Washington, D. C.

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	3
Jurisdiction	3
Basis for Federal Jurisdiction in the Federal Court	3
Questions Presented	4
Statement of the Case	5
Kind of Action and the Judgment	5
The Facts, the Issues and the Decision of the Courts Below	6
(1) White Oak's Mining Operations, Its Contract With UMW and the Termination Thereof	6
(2) Evidence of Interference With Independent Truckers Prior to Contract Termination	6
(3) Events Relating to the Start of the Strike	7
(4) A Majority of White Oak Employees Adhered to UMW During the Entire Strike. NLRB Certification of UMW's Majority	8
(5) The End of the Strike	9
(6) The Destruction of White Oak Mining Equipment	10
(7) The Issues and the Determination Thereof	10
Reasons for Granting the Writ	15
Question No. 1	15
A. A Question of Importance	15
B. Sixth Circuit's Decision Is in Conflict With the Decisions of This Court and Other Circuit Courts	20

Page

Question No. 2 22

Question No. 3 30

Question No. 4 35

Conclusion 37

Appendix 1a

TABLE OF CASES

Association of Journeymen v. Borden, 373 U. S. 690 (1963) 30, 31

Bell v. Hood, 327 U. S. 678, 680 37

Brotherhood of Carpenters & Joiners of America v. U. S., 330 U. S. 395 23

Carrier Corp. v. NLRB, (C.A. 2), 311 F. 2d 135 21

Fidelity Union Trust Co. v. Field, 311 U.S. 169, 180 (1940) 30

Flame Coal Co. v. U.M.W.A., 303 F. 2d 39 (C.A. 6) 18, 35

Gilchrist v. U.M.W.A., 290 F. 2d 36 (C.A. 6) 18

Gulf Refining Co. v. Mark C. Walker & Son Co., 124 F. 2d 420, 425 29

Hazel Atlas Glass Co. v. NLRB, 4 Cir., 127 F. 2d 109 30

Hurn v. Oursler, 289 U. S. 238, 246 ..... 35, 37

HLGWU v. NLRB, 99 App. D.C. 64, 70, 237 F. 2d 545 26

Local 207, Int'l Asso. of Bridge, Structural and Ornamental Iron Workers v. Perko, 373 U. S. 701 (1963) 30, 31

Local 761, Int'l Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB, 366 U. S. 667 ..... 7, 16, 20, 21

Local 1976, United Brotherhood of Carpenters and Joiners v. NLRB, 357 U. S. 93 ..... 21, 26

Metropolitan Life Insurance Co. v. Metropolitan Insurance Company, 180 F. Supp. 682, 688, (D.C., N.D., Ill., 1959) affirmed 277 F. 2d 896 30

Morton v. Local 20, Teamsters, Chauffeurs and Helpers Union, 320 F. 2d 505 (1963) 33, 34

NLRB v. Goodyear Tire & Rubber Co., 129 F. 2d 661, 664 (C.A. 5) 30

NLRB v. Int'l Rice Milling Co., 341 U.S. 665 (1951) 20

Page

NLRB v. Marshall Car Wheel Co., 218 F. 2d 409, 417 .. 26
NLRB v. Sun Shipbuilding etc. Co., 3 Cir., 135 F. 2d 15, 31 30
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 30, 31, 32, 33
Sunfire Coal Co. v. U.M.W.A., 313 F. 2d 108, (C.A. 6) 18, 19
Troutman v. Mutual Life Ins. Co. of N.Y., 125 F. 2d 769 29
United Auto Workers v. Russell, 356 U. S. 634 (1958) 31
United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656 (1954) 31
U.M.W.A. v. Coronado Coal Co., 259 U. S. 344, 387, 391 26
U.M.W.A. v. Osborne Mining Co., 279 F. 2d 716 (C.A. 6) 18, 35
U.M.W.A. v. Patton, 211 F. 2d 742 (C.A. 4) 35
U. S. v. White, 322 U. S. 694 26
Youngdahl v. Rainfair, Inc., 355 U. S. 131 (1957) .. 30, 31, 32

STATUTES

Labor-Management Relations Act, 1947:

Section 8(b)(4)(a) 16, 17
Section 185(c) 26
Section 303 ..... 3, 4, 5, 10, 11, 15, 16, 17, 19, 20, 21, 22, 33, 36

Labor-Management Reporting and Disclosure Act of 1959:

Section 704(c) 3

Norris-LaGuardia Act, Section 6 ..... 11, 23, 26, 28

28 U.S.C. Sections 1254(1) and 2101(c) 3

IN THE

Supreme Court of the United States

October Term, 1963

No.

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WHITE OAK COAL COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America (called "UMW"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit[1] entered May 24, 1963, in Case No. 14,873, styled White Oak Coal Company,

[1] The United States Court of Appeals for the Sixth Circuit will be referred to herein either as "the Court of Appeals" or "Sixth Circuit".

Inc., Plaintiff-Appellee,[2] v. United Mine Workers of America, Defendant-Appellant, wherein said Court affirmed the judgment of the United States District Court for the Eastern District of Tennessee, Northern Division[3] entered November 3, 1961, ordering that White Oak recover of petitioner the sum of Three Hundred Ten Thousand Dollars ($310,000), with costs, consisting of compensatory damages of One Hundred Eighty-Five Thousand Dollars ($185,000) and punitive damages of One Hundred Twenty-Five Thousand Dollars ($125,000)[4] (R. 43),[5] as well as the order of said Sixth Circuit entered on July 22, 1963, amending its opinion filed May 24, 1963, herein, and denying to petitioner a timely filed petition for rehearing in the case (A. 28).[6]

---

[2] White Oak Coal Company, Inc. will be referred to herein as "White Oak".

[3] The United States District Court for the Eastern District of Tennessee, Northern Division, will be referred to herein as the "district court" or the "trial court".

[4] The order of the district court entered November 3, 1961, overruled UMW's motion for judgment notwithstanding the verdict but granted a new trial unless within ten days from the date of entry of the order the plaintiff White Oak should file its written consent to a remittitur of Seventy-Five Thousand Dollars ($75,000) of the punitive award, which award had initially been Two Hundred Thousand Dollars ($200,000), in accordance with the jury's verdict. The order further provided that if the remittitur was accepted UMW's motion for a new trial would be denied. On November 6, 1961, White Oak filed its consent to the remittitur thus reducing the punitive award to One Hundred Twenty-Five Thousand Dollars ($125,000) (R. 44).

[5] The abbreviation "R." refers to the printed, certified record of the Sixth Circuit filed in the Supreme Court of the United States. References to page numbers therein will omit the letter "a".

[6] The abbreviation "A." refers to the Appendix to this Petition. References to page numbers therein will omit the letter "a".

A certified appendix record in said case, together with the proceedings in the Sixth Circuit, is furnished herewith in accordance with this Court's rules.

OPINIONS BELOW

The Sixth Circuit's opinion appears in the Appendix hereto beginning at page 1, and is reported in 318 F. 2d 591 (Adv. Op. August 19, 1963). The District Court's opinion, which is not reported appears in the Certified Record (R. 35-42).

JURISDICTION

The Sixth Circuit's judgment affirming the trial court's judgment, as aforesaid, was entered May 24, 1963 (A. 27), while the Sixth Circuit's order denying petitioner's petition to rehear was entered July 22, 1963 (A. 28).

The Court's jurisdiction is invoked under 28 USC Secs. 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE FEDERAL COURT

In its amended complaint, White Oak alleged "The Court has jurisdiction of this action by virtue of the provisions of Section 303 of the Labor Management Relations Act of 1947 (29 USCA Sec. 187)."[7] (R. 11)

---

[7] This reference is to Section 303 of the Labor-Management Relations Act, 1947, prior to amendment thereof by Section 704(c) of the Labor-Management Reporting and Disclosure Act of 1959 (Pub. L. 87-257, Title VII, Sec. 704(c), 73 Stat. 545, 29 USC Sec. 187. All references in this petition to "Section 303" are to Section 303 of the Act prior to the 1959 amendment. The amendment does not alter the questions involved.

QUESTIONS PRESENTED

1. May damages be awarded under Section 303 of the Labor Management Relations Act to a plaintiff, engaged in coal mining, against a union engaged in a strike against plaintiff for incidents occurring at the mining operations of other employers also engaged in coal mining at other locations and with whom the union also has a labor dispute, which incidents consisted of "violence sufficiently spectacular" that they become known to employees of a trucking contractor causing such employees to refuse to work at plaintiff's premises or to haul coal from plaintiff's mine because said employees might regard these incidents of violence as an indication of what might happen to them if they performed their duties at plaintiff's mine?

2. Is a jury verdict of labor union responsibility and a judgment for damages based thereon proper in an action under Section 303, Labor Management Relations Act, 1947, and the law of the State of Tennessee, where such responsibility was necessarily based upon the conduct of union members or of unknown persons and not that of agents or employees of the union, and not authorized, participated in or ratified by the union?

3. In a suit for damages under state law by an employer against a labor union, is a court empowered, notwithstanding the principles of federal preemption, to render judgment against the union for compensatory damages based upon the total loss sustained by the employer by reason of an economic strike of his employees, and for punitive damages, merely because violence and disorder for which the union is held responsible occurs during its course, where it affirma-

tively appears that the union is bargaining agent of the employees involved and that the employer's inability to operate and consequent losses were the result of primary union activity to obtain a union contract?

4. In an action for damages against a labor union in which plaintiff contends certain acts which occurred during a labor dispute constituted a violation of Section 303 of the Act and that the union's entire course of conduct during the dispute constituted a violation of state common and statute law, was the District Court empowered under the theory of ancillary or pendant jurisdiction, to determine the non-federal claim?

STATEMENT OF THE CASE

Kind of Action and the Judgment

By amended complaint (R. 11) White Oak charged that UMW, a labor organization, during the course of a 1959 strike, violated the Act's Section 303 and also common and statute law of Tennessee. UMW denied the amended complaint's material allegations (R. 15).

The jury found UMW liable under both federal and state law and found White Oak entitled to recover $185,000 in compensatory damages and $200,000 in punitive damages (R. 26). Judgment was entered accordingly (R. 27) and subsequently the District Court overruled UMW's motion for judgment n.o.v. and the various grounds of its motion for a new trial except ground 6 thereof in which UMW asserted that the punitive award manifested and was the result of passion, prejudice and caprice. The District Court found the verdict excessive in the amount of $75,000, and granted a new trial unless

White Oak accepted a remittitur of such amount (R. 41-43). White Oak accepted the remittitur and UMW filed its Notice of Appeal (R. 44).

On May 24, 1963, the Sixth Circuit affirmed, and on July 22, 1963, Sixth Circuit modified its opinion and denied a petition to rehear (A. 28).

The Facts, the Issues and the Decision of the Courts Below

(1) White Oak's Mining Operations, Its Contract With UMW and the Termination Thereof.

White Oak was one of several corporations through which the U. R. Arnold family engaged in the mining, processing and selling of coal. It was organized in 1957 and subsequently engaged in strip mining at two mines in Campbell County, Tennessee, and the operation of two preparation plants or "tipples". (R. 57-59, 64, 112).

White Oak operated under a UMW contract and all but one of its thirty or more employees were UMW members (R. 60, 64-66, 112, 116). In early 1959 UMW requested White Oak agree to a contract amendment and upon White Oak's refusal UMW gave a sixty-day notice of termination, effective March 15, 1959 (R. 69-70, 443, 444).

(2) Evidence of Interference With Independent Truckers Prior to Contract Termination.

Evidence of interference prior to the termination date of the contract with independent truckers hauling coal from one of White Oak's tipples was *at first* relied upon by the Sixth Circuit as a basis for affirming that UMW had engaged in a Taft-Hartley Act secondary boycott. In the decision on the petition to rehear, however, the Court modified its opinion holding that this interference was an "incidental and permis-

sible part" of the primary picketing, under the rule of *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *NLRB*, 366 U.S. 667 (A. 28).

This interference is with regard to three employees of a truck contractor who hauled coal from a White Oak tipple to a retail coal yard. While White Oak was still at work, but during the 60-day termination period, a group of unidentified men stopped the drivers near the entrance to the tipple and threatened them for hauling "non-union" coal (R. 145, 155-157, 197, 201-202). One of the drivers also claimed that a car tried to run him off the road (R. 146). Another said he was followed by a car for some distance (R. 247). UMW denied knowledge of or responsibility for these incidents (R. 476).

Though considering these incidents "permissive" under Section 303, the Sixth Circuit nevertheless found UMW had engaged in an unlawful secondary boycott. Significantly, however, they are the only incidents in the record which involve truckers ("secondary employees") working for White Oak.

(3) Events Relating to the Start of the Strike.

The strike began on March 16, a Monday. White Oak anticipated the closure by loading out all mined coal on the previous work day (R. 548-549, 353, 354, 568) and had not scheduled work at either of its tipples or its smaller mine March 16 (R. 74-75, 117, 517, 529). It had, however, called men to work at its larger mine and though there was confusion as to whether productive or repair work would be done (R. 521-522, 549-550), some of these men reported (R. 354-355). Among those reporting was Floyd Hemsworth, its

superintendent, and Jim Tidwell, assistant foreman and president of the UMW White Oak local union. Tidwell said he had understood that no productive work was to be undertaken (R. 554-555).

On the same day, UMW Representatives Prater and Daniels organized a motoreade of a number of members to publicize its dispute with a number of area coal operators (R. 446). The motoreade was to pass the White Oak mine on a public road. Prater, driving the lead car, missed a turn near the mine and, upon stopping to back up, saw Tidwell walking towards him from the mine. Tidwell told Daniels and Prater the employees were going to set the pumps and do repair work (R. 448, 555, 600). The three of them talked with superintendent Hemsworth, *who acknowledged that the conversation was completely friendly* (R. 361), and told him he could pump water or repair equipment so far as UMW was concerned (R. 356-361, 448, 449, 550). The motoreade left after a few minutes (R. 361, 379, 448).

Meetings were held thereafter between representatives of the union and the coal operators, including White Oak, and the Federal Mediation and Conciliation Service, and the proposed contract amendment was discussed. No agreement was reached and the strike continued (R. 77, 657-658).

(4) A Majority of White Oak Employees Adhered to UMW During the Entire Strike. NLRB Certification of UMW's Majority.

No work was performed at the White Oak mine after March 16 until a UMW contract was signed the following September (R. 98-100). Meanwhile White Oak put out "rumors" it was to start work, but according to its superintendent, never had enough men report

to resume work (R. 362). Most of the employees and truck drivers testified they had not been asked to return (R. 358, 362, 491, 517, 524-525, 529, 572, 535, 537, 541, 641, 649). Virtually all of these employees were members of UMW's White Oak Local Union and attended regular union meetings before and during the strike. Nearly all White Oak employees received union aid during the strike (R. 66, 207, 349, 380, 397, 408, 413, 414, 445, 490, 496, 512, 518, 526, 529, 535, 537, 541, 562). A union committee of three White Oak employees administered the union's relief program (R. 413, 561).

In May, 1959, Scott County Miners Union (sometimes referred to as "Southern Labor Union") petitioned NLRB for certification as bargaining representative of White Oak employees. UMW intervened in the case. The Board conducted an election on August 16, 1959, and certified that White Oak employees cast 15 votes for UMW and 8 for Scott County Miner's Union (R. 654-657).

(5) The End of the Strike.

Following the NLRB election a new corporation, owned principally by Arnold children, was organized to take over the White Oak equipment and employees. In September this corporation (Dixie Pine Coal Company) signed a UMW contract and work resumed (R. 99-101, 273-274, 288-289, 304, 675). Arnold himself did not start work until the spring of 1960, and then through another new corporation, Round Mountain Coal Company (R. 126, 134).

(6) The Destruction of White Oak Mining Equipment.

On the night of July 13, 1963, mining equipment at the smaller White Oak mine was destroyed by dynamite. Extensive investigation by local and state authorities failed to determine responsibility (R. 95-97, 128, 221-223, 230-235). UMW emphatically denied its involvement in the incident (R. 673-684; 473-474; 608-609).

(7) The Issues and the Determination Thereof.

The central issues submitted to the jury were whether UMW, through agents or "sub-agents", violated Section 303 and statute and common law of Tennessee,[8] and its verdict of liability was upheld by both the District Court and the Sixth Circuit.

The Sixth Circuit bases its conclusion on the legitimacy of jury inferences drawn from the totality of the evidence, and, as a premise to its conclusion, it dwells at length on a potpourri of incidents, discussed below, which occurred in the area during the course of the dispute and even four years before the dispute.

The Sixth Circuit thus held:

1. The jury correctly found a secondary boycott notwithstanding the absence of secondary employees save in instances in which the specific acts complained of were held "permissive" un-

[8] The District Court instructed the jury (R. 718) to consider whether UMW had violated Tennessee statutes making it a crime to engage in "willful prowling or traveling through the country or towns, to the disturbance of the peace," etc.; to obstruct a public or private highway; to carry pistols with the intent to go armed; to shoot or throw missles into a dwelling; to damage property by dynamite; and to transport explosives.

der Section 303—all on the theory that union actions at other places prevented the engagement of secondary employees.

2. The jury correctly found union "interference" under state law entitling White Oak to damages for total losses sustained during a strike and six months thereafter, on the theory that employees ceased work and remained away from work because of fear, notwithstanding the union's majority status and NLRB certification thereof, and notwithstanding the causal relationship between the losses sustained and the lawful concerted activity; and its conclusion was reached without regard to the principle of federal preemption.

3. The jury was entitled to infer, with respect to unlawful acts of unknown persons which occurred during the course of a labor dispute that such acts were participated in or were authorized by union agents or union members who had been appointed "sub-agents" with authority so to act; and that the evidence upon which such inference is based constitutes "clear proof" of responsibility for such acts, as required by Section 6 of the Norris-LaGuardia Act.

In addition to the foregoing, the Sixth Circuit, notwithstanding an almost total absence of proof relevant to the claimed secondary boycott, approved without discussion the exercise of ancillary jurisdiction with respect to the non-federal claim.

The other evidence detailed in its opinion by the Sixth Circuit in context with the facts stated above relates broadly to UMW's interest in the labor dispute.

A fact considered was the large monthly expenditure by UMW for grocery orders to striking members (R. 428-429). Another was the advent of a rival union, the so-called "Southern Labor Union", and the hotly stated resistance to it in UMW meetings—though no mention is made by the Court of the undisputed evidence of Southern Labor Union's reputation as a company sponsored union (R. 466-469).

Adopting the language of White Oak's Arnold, the Sixth Circuit found circumstantial weight in its conclusion that White Oak employees were "well satisfied" with their wages and that, prior to the strike, they didn't "complain" about expiration of the UMW contract (R. 71, 435).

The Court discusses at length the dynamiting of the Gilchrist tipple in nearby Jellico some ten miles from White Oak, and the subsequent clandestine dynamiting of the Snyder and Randolph auger in Kentucky. The Sixth Circuit says that UMW representatives "admitted" being at the Gilchrist tipple near midnight "prior to the dynamiting" yet it fails to mention that that particular "midnight" happened to be three months before the dynamiting incident! The dynamiting incident occurred in June (R. 220); Prater and Daniels were at the tipple on March 9 (R. 478-479). The Court also points out that UMW representatives were "in Jellico" on the night of the Gilchrist explosion, but it must be noted that this is where these men worked and resided at the time (R. 481-482, 607).

The Court notes that trucks hauling coal during the strike were shot at from ambush, and that on one of these occasions the truck had a "permit" from a UMW representative (R. 93, 146-148, 401).

The opinion twice states that a UMW member (Hubert Bailey) said during the strike that "as long as the union is paying us $25.00 a week and furnishing us plenty of dynamite, Arnold (White Oak) is not about to go back to work." It does not state, however, that the individual involved made the statement during, but wholly out of context with, the labor dispute and while he was engaged in making and drinking moonshine in a remote mountain section (R. 191-196). The Sixth Circuit held that the "agency" status of this individual to UMW was for the jury to decide because of his membership on a relief committee of one of the area local unions (not the local union at White Oak) and because, while at this work, certain of his meals were paid for by a UMW representative.[9]

The Court also refers to evidence that a UMW representative warned a White Oak employee not to vote,

---

[9] James Veach, son of a coal mine operator, testified that in July 1959 he went up a mountain near Saxton, Kentucky, following a carload of boys to see if they had a moonshine still up there. He found they did. Present were John, Dave and Clarence Bryant, Hubert Bailey, Billy Rowe, B. Davis and a man named "The Big Bopper" (not a UMW member R. 465). They were all drinking. They gave him $5.00 to get them something to eat, which he did. Veach spent five hours with them during which time "Big Bopper" said, "I heard Arnold is going back to work" and Hubert Bailey replied, "As long as the union is paying us $25.00 per week and furnishes us plenty of dynamite, Arnold is not about to go back to work." He made no report of the incident until two or three weeks before the trial except to his father (R. 191-195). Bailey is identified as a truck driver for an auger operator. He was a resident of the "Buck Creek" section of Kentucky and joined the union in the spring of 1959 along with numerous other miners and truckers of that area (R. 461-462, 510). Bailey received $25.00 worth of groceries weekly and was a member of a local union committee in his area to check on the eligibility for relief of a great number of persons in the Buck Creek area. He was not employed by UMW in any capacity (R. 460, 464-465).

in the NLRB election for Southern Labor Union (R. 395-396), but it does not consider that objections were filed to the election by Southern Labor Union but were withdrawn.

The Sixth Circuit found probative a statement allegedly made by UMW Representative Daniels at a union meeting to the effect that the union had been accused of "blowing up things" and therefore that they "might as well go full blast ahead". The Court does not point out, however, that this was said as an inducement to picket and not to do violence of any kind (R. 258). The Court also considered the testimony of convicted perjuror Smiddy, who had not been a UMW member for more than twenty years, that Daniels had told him he would rather Smiddy would not continue as a White Oak night watchman and that Smiddy could "make more money working with a wrecking crew" (R. 371); it overlooked, however, that UMW had no objection to members working as nightwatchmen. UMW member McNeely, a White Oak employee, worked as a nightwatchman during the strike, but nevertheless continued to attend union meetings, continued to receive weekly grocery orders and was never molested in any way (R. 411-412).

The Court approved, over UMW's objection, the introduction of evidence of a beating inflicted upon an area non-union operator in 1955, some four years before the White Oak dispute, on the theory that it was probative of White Oak employees and truckers' state of mind in 1959 notwithstanding the absence of UMW representatives or of a then current union dispute with that operator (R. 153, 196-203, 259-266).

Significantly the Court approved, over UMW's objection, the introduction and jury consideration of evi-

dence of a notice posted by UMW pursuant to settlement of unfair labor practice charges with the National Labor Relations Board, notwithstanding the settlement agreement (of which the notice was a part) provided that such settlement *would not* be admissible in evidence in any court or cause except in a case brought by the Board. The notice recited UMW would not "restrain or coerce" employees in the exercise of their rights under the Act (R. 40-41, 81, 87-89, 137-139).

It is unnecessary to state this and similar evidence in further detail with regard to the questions presented by this petition. In sum, the Sixth Circuit felt that permissible jury conclusions therefrom were that unlawful acts had been committed and that agents of UMW were legally responsible for them.

REASONS FOR GRANTING WRIT

QUESTION NO. 1

A. A Question of Importance

The question presented is one of importance for the reason that the problems are of wide import dealing with basic rights of labor unions and their members under the Act. The decision seriously curtails unions and their members in their right to strike and to engage in picketing because it so circumscribes and conditions these rights it all but destroys them.

The Sixth Circuit concluded petitioner violated Section 303 of the Act because the union engaged in

> "'. . . violence sufficiently spectacular and in such proximity to appellee's operation as to become known to secondary employers and their employees and induce them to discontinue . . . hauling coal' for appellee . . . . From the evidence there can be no question that . . . the secondary employers and employees knew all about incidents at

the other locations and mines. They might reasonably regard these incidents as an indication as to what might happen to themselves if they persisted in mining or hauling coal for appellee. The incidents with respect to other mines and locations constitute a form of influence by the union." (A. 11).[10]

Neither this Court, the NLRB, nor any other Circuit Court has heretofore rendered any decision interpreting either Section 303 or Section 8(b)(4)(a), the so-called secondary boycott provisions of the Act, as they relate to this form of activity, but because of its impact upon all organized labor, the application of these sections in this manner should be decided by this Court.

It must be remembered that the activities relied upon by the Sixth Circuit to find a Section 303 violation were directed towards neither employers and employees involved in the dispute between White Oak and UMW nor directed against the employees of the Snyder Coal Company, the so-called secondary employer hauling coal for White Oak. The activities, relied upon as the illegal inducement, occurred as long as four years before and as long as three months after the dispute took place and were directed against other employers and employees at other mines at other locations.

[10] The Sixth Circuit also found interference with secondary employees at the entrance to White Oak's property and an employee on the way home a violation of Section 303, but on the Petition to Rehear amended its decision to find such conduct incidental and permissible to subsequent primary picketing citing *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667. Having found such conduct permissible, Sixth Circuit should have reversed and remanded case for a new trial.

This decision represents a broad expansion of the secondary boycott provisions of the Act. It says, in effect, that when a union engages in a primary strike against employer A and, during that strike, engages in such violence that may come to the attention of secondary employees of employer B and has the effect of causing the secondary employees to cease performing work or services for employer C, such conduct violates Section 303 of the Act as to employers B and C. It thus makes all sufficiently spectacular violence a violation of Section 303 and Section 8(b)(4)(a) and subjects the union to damages not only for the direct consequences of the violent conduct, but for its *effect* on other employees at other locations, at other times and in other disputes.

Therefore, within a given area, before a union may strike against an employer, it can do so only if there has not been any spectacular violence in close proximity to the employer's operations within the past few years and only if the secondary employees might not reasonably decide that they would also be subjected to such violence. The striking employees and the union, of course, would have to have all the facts to make the decision to strike. Such facts, of course, would not be readily available. Secondly "spectacular violence" is such a general term that it would be difficult to decide what other people might include within that description.[11] Furthermore, the union and the employees

[11] The Sixth Circuit did not specify what violence it considered sufficiently spectacular to bring it to the attention of the employers and employees involved. Such knowledge by the employees was imputed by the Sixth Circuit and was not based upon testimony of the employees involved. However, in considering the agency issue, the Circuit Court cited two instances of dynamiting of

would have to guess as to secondary employers' and employees' knowledge of the violence and what they might reasonably conclude would happen to them under the circumstances. Limitations of the basic rights of unions and employees, guaranteed by the Act, by such vague and generalized concepts as outlined in this decision warrants review by this Court. It should be noted that not a single striking employee (of White Oak) participated in any of the illegal conduct or had any knowledge of it, yet their union is held liable for all losses suffered by White Oak occasioned by their strike.

It should be noted that the Sixth Circuit's Opinion relies solely upon its own decisions against the UMW as authority for its affirmance of the lower court's judgment citing *Sunfire Coal Company* v. *United Mine Workers of America*, 313 F.2d 108 (C.A. 6); *Flame Coal Company* v. *United Mine Workers of America*, 303 F. 2d 39 (C.A. 6); *Gilchrist* v. *United Mine Workers of America*, 290 F. 2d 36 (C.A. 6); *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. 2d 716 (C.A. 6). In these decisions the Sixth Circuit has not followed the teachings of this Court, and such failure has resulted in the imposition of damages against UMW amounting to over one million dollars with the resultant deprivation of the ability of large numbers of coal miners to participate in the collective bargaining process. These decisions stemming from the coal mining regions of Tennessee and Kentucky have been one of the most important factors in bring-

equipment and property. Therefore, it is assumed the spectacular violence referred to included the two incidents which occurred in May and June, 1959, and the incidents which occurred in 1955—four years prior to the dispute. (A. 23)

ing about economic chaos in these areas, the extent of which has caused it to come to the attention of the entire nation. There is now pending a petition for writ of certiorari in this Court, Case No. 447, to review the decision and judgment of the Sixth Circuit in *Sunfire Coal Company* v. *UMWA*, 313 F. 2d 108 (C.A. 6); which further deals with this condition. The Sixth Circuit's interpretation of these two cases enmeshes most of the problems involved. It is suggested that this Court might consider reviewing these cases together. However, it should be pointed out that these five cases did not encompass the spectacular violence theory but that the instant case represents a broad expansion of the secondary boycott provisions. Furthermore, such theory was not even submitted to the jury. Also all of these cases, except Sunfire and White Oak, were decided prior to Local 761 and are in conflict with it but Sixth Circuit has not followed Local 761 and has instead expanded the "literal approach" condemned by that case.

UMW submits that unions need greater clarification as to what are permissible acts under Sec. 303 under the circumstances outlined in this case, and it is necessary for this Court to clarify established evidentiary guide lines by which the true objectives of union activity can be ascertained in the absence of an admission of an illegal object, for the reason that these cases are being determined by juries totally inexperienced in such matters and without adequate appreciation of the complexities of the subject that has caused consternation even among labor relations experts since its enactment in 1947. Because the dispute is between an employer and employees almost all persons experienced in these matters are excluded from the jury.

B. Sixth Circuit's Decision Is in Conflict With the Decisions of This Court and Other Circuit Courts

The Sixth Circuit's decision that spectacular violence occurring within the context of a labor dispute at the mining operations of employers, at different times and at different locations other than the operations of the primary and/or secondary employer, constitutes conduct prohibited by Section 303, is in conflict with the principles and holdings enunciated by this Court in *NLRB* v. *International Rice Milling Company*, 341 U.S. 665 (1951); and *Local 761, International Union of Electrical, Radio and Machine Workers* v. *NLRB*, 366 U.S. 667.

The Sixth Circuit's affirmance herein makes violence attending the inducement of secondary employees a material factor to the question whether such activity is primary or secondary, contrary to this Court's holding that ". . . violence on the picket line . . . is not material. To reach it, the complaint more properly would have relied upon Section 8(b)(1)(a) of the Act, or would have addressed itself to local authorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with Section 8(b)(4)." *NLRB* v. *International Rice Milling Company, supra.*

The decision also substitutes as a test of illegality the *effect* of the union's activity where this Court has laid down as a guide line, in accordance with the statute, that the union activity must have an *object* of forcing or requiring secondary employer to cease doing business with the primary employer. It ignores the decisions of this Court that primary activities are protected by the Act, regardless of their effect on sec-

ondary employees, and that it is only the secondary activities that are barred, and ignores the guide lines set down in *Local 761, supra; International Rice Milling, supra;* and *Local 1976, United Brotherhood of Carpenters and Joiners v. NLRB*, 357 U.S. 93. The object of UMW could not have been the inducement of Snyder employees to quit hauling coal from White Oak because this spectacular violence occurred four years prior to the dispute and two years before White Oak went into business and some of it occurred at least three months after the secondary employees quit hauling coal and White Oak was shut down by the strike. The record is devoid of evidence that UMW even knew that truck drivers were employed by the Snyder Coal Co.

Actually, neither the Board nor other Circuit Courts have experienced difficulty in determining legal primary and illegal secondary activities when the primary and secondary work sites were separated as in the instant case. The vexing problems occurred when both employers occupied the same sites.[12] The Sixth Circuit's holding is so far contrary to all decisions of this Court, of the Board and other circuits that it goes beyond even the literal approach of interpreting the secondary boycott sections, and brings within the prohibitions of section 303 activities that do not concern either the primary or secondary premises. The facts here show that UMW did not move its dispute with White Oak to the business site of the secondary em-

[12] The cases describing these difficulties are set forth in *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667 and in *Carrier Corporation* v. *NLRB*, 2nd Cir. 311 F. 2d 135, in which a Petition for a Writ of Certiorari was granted, Case No. 925. For brevity these cases are not set forth in this Petition.

ployer but confined its dispute with White Oak to White Oak's mining operations.

QUESTION NO. 2

The Trial Court submitted to the jury, and the Sixth Circuit approved, the legal proposition that if an employer suffers damages resulting from a strike of his employees and there occurs, during the course of this strike unlawful conduct the guilty party becomes liable for all damages resulting from the legal conduct *and* the illegal conduct.

The manner of determination by the Sixth Circuit of the question of UMW responsibility involved a legal question and not merely a question of fact. It is of such great importance to all organized labor that a review of this question should be made by this Court.

The illegal acts for which UMW was held responsible are as follows:

(1) The violation of Section 303 under the Sixth Circuit's "spectacular violence" theory at mines other than White Oak.

(2) The violation of the law of Tennessee which consisted of the following:

a. Threats made against truck drivers of Snyder Coal Company in early March, prior to the strike which began March 16, 1959. Such threats were made by unknown persons and no evidence in the record links UMW with them.

b. The refusal of a majority of White Oak's employees to go to work on March 16 when their collective bargaining contract terminated.

c. The dynamiting of White Oak's equipment on July 13 by unknown persons.

Since the Sixth Circuit found secondary boycott liability under its spectacular violence theory, which violence occurred at mines other than those of the primary and secondary employer involved in this case, it was necessary to find evidence to support union responsibility for such spectacular violence. Having found such responsibility under the Federal law, the Sixth Circuit further determined that the same evidence supported the verdict that UMW was responsible for the violation of the law of Tennessee under the delimiting rule laid down by *Brotherhood of Carpenters & Joiners of America* v. *United States*, 330 U.S. 395. (A. 15). Evidently the Sixth Circuit recognized that the Norris-LaGuardia Act's agency section, 29 USC Sec. 106, applies to the non-federal cause of action since such delimiting rule involved the interpretation of that section in the *Brotherhood of Carpenter's* case.

A summary of the evidence found by the Sixth Circuit to be sufficient to sustain UMW's responsibility for all illegal conduct is as follows:

1. It was agreed that for the purposes of this case District 19, United Mine Workers of America, was an agent of the International Union, the Petitioner (A. 12) and Prater and Daniels, field representatives of District 19, asked Arnold, President of White Oak, to sign a new contract with UMW in March 1959 (A. 12).

2. Prater and Daniels were, "prior to the dynamiting of the Randolph mining property" (actually over three months prior thereto [R. 478, 479]—a fact

left out of Sixth Circuit's opinion), at the tipples belonging to Gilchrist & Sons where Randolph's coal was being processed and several truck drivers dumped their coal on the sidewalk when Prater asked one of them not to put the coal over the tipples (a strike was on among Gilchrist's employees at the tipples.) The "Randolph mining property" was an auger located in Kentucky belonging to the Snyder & Randolph Coal Co. The tipple was in Jellico, Tennessee and belonged to Gilchrist & Sons. The coal was trucked from the mine to the tipple to be processed and loaded.

3. Prater and Daniels were in Jellico, Tennessee on May 6, 1959, the night the Gilchrist tipples were blown up. Daniels at the time was at home in bed and Prater was in bed at the hotel where he lived (R. 465). Neither got up to investigate the explosion although they heard it and both saw it the next morning. The next day Prater called the sheriff when he heard some UMW members were arrested. (The record is silent as to whether any members were arrested or whether there was any further disposition of the case).

4. Prater told White Oak employees there would be war if the Southern Labor Union came into the field.

5. Prater and Hubert Bailey a UMW member, bought four pistols from a restaurant owner (A. 8) and antique gun collector (R. 162-464). Prater, during the months of May to July, bought gas and meals for Bailey, Cox, Eson Bryant, Clarence Bryant and Justice, all members of UMW, at the same restaurant. (Circuit Court did not refer to fact that these members supervised, for their Local Union, the disbursement of $25 a week grocery orders to those on strike

in their area (R. 460-462, 465). This did not include White Oak, Snyder & Randolph or Gilchrist). Bailey was overheard telling a group of men in July, "As long as the union is paying us $25 a week (grocery orders) and furnishing us plenty of dynamite, Arnold is not about to go back to work" (A. 13, 14).

6. Daniels, in a speech at a local union gathering, said as long as the union has been accused of doing damage and blowing up things, they "might as well go full blast ahead".[12] Daniels told Smiddy, a night watchman for White Oak,[13] that "I would rather you didn't work at that. The boys like you and they don't want to hurt you and don't want to get hurt." When the witness told him he had to work at something, Daniels said: "Well you can make more money working with a wrecking crew . . . one night's work will pay you more than you can work for . . . Arnold for a month." The witness then stated to Daniels: "I told him I didn't want that kind of a job" (A. 14).

None of the above constitutes sufficient circumstantial evidence that Prater or Daniels destroyed the Gilchrist tipples, Randolph's equipment or committed any of the illegal acts in 1955 or 1956. Nor does such evidence suffice to prove Bailey committed these acts but, if he did, there is no proof it was done at the behest of Prater or Daniels or any other union represen-

[12] Daniels then said he wanted to see them out on a picket line in Dellaco (R. 258). This was omitted from the opinion, although it was from the same testimony.

[13] Smiddy, a convicted perjurer, obtained the night watchman's job after reporting that Bailey and others told him they were going to "work over" Homer Marcum, a White Oak employee (R. 370, 371).

tative. Thus, there is by judicial decision an imposition of union liability for a Taft-Hartley violation that is contrary to the common law law of agency, the test of union's responsibility under Sec. 185(e) of the Act, and is contrary to the rationale of *UMWA* v. *Coronado Coal Co.*, 259 U.S. 344, 387, 391, *U. S.* v. *White*, 322 U.S. 694, and of the Court of Appeals for the District of Columbia in *International Ladies Garment Workers Union* v. *NLRB*, 99 App. D.C. 64, 70, 237 F. 2d 545 wherein the D. C. Circuit said that the imputation of the acts of one person to another "is forbidden" . . . "except when the one is acting as agent for the other" and is contrary to the decision of the Fifth Circuit, *NLRB* v. *Marshall Car Wheel Co.*, 218 F. 2d 409, 417, when it rejected the proposition that there was an agency relationship "between all strikers, the guilty employees and the union".

In addition, this decision, as it relates to the application of the Norris-LaGuardia agency test to be applied by Federal Courts in cases involving state causes of action, is contrary to interpretation by this Court in *International Brotherhood of Carpenters, supra.* The Sixth Circuit, recognizing the delimiting rule of *International Brotherhood of Carpenters, supra* totally misconstrues that decision's interpretation of Norris-LaGuardia's Section 6 that a union is not responsible for conduct except upon *clear proof* that it actually authorized, participated in or ratified the specified illegal conduct. None of the evidence relied upon by the Sixth Circuit, and none of the evidence introduced at the trial was to the effect that Petitioner had knowledge of the illegal acts before or after their occurrence or had taken *any* action in regard thereto. The only evidence in the record upon which the jury and Court

could rely was affirmative evidence that the Union did not authorize or participate in it in any way (R. 473, 607, 608, 673, 674).

An examination of this evidence reveals a total failure of it to prove that those unknown individuals who threatened Snyder truck drivers in early March were sub-agents of UMW. All of the evidence cited by the Sixth Circuit concerned activities which occurred in May and none of the individuals named were among those who interferred with these truck drivers.

Furthermore, there could be no causal connection between what occurred in May, June or July and the refusal of White Oak's employees and UMW members to work when their contract ran out in March. The contract termination and lawful union inducement was the obvious reason for the strike and UMW's majority support was still intact in August when an election was held by NLRB. However, the Sixth Circuit found that the jury could properly *infer* improper inducement because of UMW's fight with a rival union. Again, an impossibility, because this election campaign did not start until June nor does the record reveal any improper conduct directed against these employees during the campaign. The same applies to any statements made by union representatives prior to the dynamiting. This finding by the Sixth Circuit is based purely on speculation by it. There is not a scintilla of evidence that a majority of these employees quit work other than to support their collective bargaining demands.

As to the dynamiting of the Gilchrist tipples in May and Snyder & Randolph's anger in June, the Sixth Circuit's opinion establishes UMW's responsibility by finding UMW was engaged in a labor dispute when

such property damage occurred and that its representatives were in bed in their homes at the time one of the explosions occurred; one makes inquiry of the Sheriff if any union members have been arrested for one of the explosions; another representative at a subsequent date says we have been accused of the dynamiting and "we might as well go full blast ahead" and then calls for a picket line. It is submitted that such evidence does not satisfy any rule of law so as to make any person liable for such illegal conduct. Nor is the deficiency supplied if added to the hearsay testimony which establishes that a union member (Bailey), who had a duty of assisting in distributing relief to unemployed members on behalf of his local union, stated that Arnold (White Oak) won't work as long as the union gives relief and furnishes us dynamiite. Lacking evidence that this union member did commit any of the dynamiting and that the union did furnish him or any other member such dynamite such evidence does not fulfill the quantum of proof necessary under Taft-Hartley or Norris-LaGuardia to establish union responsibility; nor does the fact that one of these union representatives asked a guard not to work as a guard stating he could make more money as a member of a wrecking crew add to the quantum of proof necessary to fulfill Taft-Hartley's or Norris-LaGuardia's agency requirements. Certainly this could not be so absent proof that the guard committed any of these acts of dynamiting or that the union did pay anyone else to become a member of a wrecking crew and that such wrecking crew did commit any of the unlawful dynamiting. All of this evidence, considered as a whole, illustrates that what Sixth Circuit has done is to establish a new rule of law as it applies to union responsibility and one that is in conflict with governing statutes

and other case law. A rule so important should be reviewed by this Court.

The Circuit Court's opinion remains silent as to what evidence it considered sufficient to show UMW's responsibility for the incidents occurring in 1955 and 1956, three or four years prior to the incidents in the present case (A. 23, 24). The reason, of course, is that *no* such evidence was introduced at the trial except that these incidents occurred during what the Court described as a "No contract-No work" campaign. This brings into sharp focus Sixth Circuit's announcement of a new doctrine of union responsibility.[15]

By this method, the Sixth Circuit has in fact made a union responsible for *all* illegal conduct that may have occurred during the course of an economic strike—a theory, which, if applied, would destroy organized labor for the reason that a union does not and cannot control everyone who may be interested in a labor dispute. There is in the record—not detailed here—evidence that lends suspicion that these coal companies, hard pressed for funds caused by the strike, destroyed the equipment to collect insurance, but a jury should not be allowed to speculate between two alternative suspicions. Such procedure is condemned by the Sixth Circuit in non-labor cases *Troutman* v. *Mutual Life Ins. Co. of N. Y.*, 125 F. 2d 769; *Gulf Refining Co.* v. *Mark C. Walker & Son Co.*, 424 F. 2d 420, 425. The same law should apply in labor cases.

[15] UMW had contended that such evidence was inadmissible because (1) the UMW was not responsible; (2) too remote in time, and (3) if mental state of employees or employers was an issue then only their knowledge or mental state could be placed into evidence. Sixth Circuit did not write on this latter point.

Other circuits have condemned the raising of suspicions to the status of fact. *NLRB* v. *Sun Shipbuilding etc. Co.*, 3 Cir., 135 F. 2d 15, 31; *Hazel Atlas Glass Co.* v. *NLRB*, 4 Cir., 127 F. 2d 109; *NLRB* v. *Goodyear Tire & Rubber Co.*, 5 Cir., 129 F. 2d 661, 664.

QUESTION NO. 3

The Sixth Circuit, in a suit under statute and common law of Tennessee, has upheld a judgment for compensatory and punitive damages for activities not proscribed but protected under federal law.[16] The decision, which disregards the principle of federal preemption, has determined questions which importantly affect the national labor policy in a manner inconsistent with decisions of this Court, notably *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Association of Journeymen* v. *Borden*, 373 U.S. 390 (1963) and *Iron Workers Local 207* v. *Perko*, 373 U.S. 701 (1963).

The *Garmon* case held that absent an overriding state interest such as that involved in the maintenance of domestic peace, state courts[16] must defer to the ex-

[16] To the extent the District Court determined the non-federal or state law claim in the instant case it, in effect, sat as a court of the State of Tennessee, see *Metropolitan Life Insurance Company* v. *Metropolitan Insurance Company*, 180 F. Supp. 682, 688, (D.C., N.D., Ill., 1959) affirmed 277 F. 2d 896, and thus the *Garmon* rule is as applicable here as it would have been had White Oak brought its suit in the courts of Tennessee. As Chief Justice Hughes said in an analogous situation: "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstances of diversity of citizenship." *Fidelity Union Trust Company* v. *Field*, 311 U.S. 169, 180 (1940).

clusive competence of the National Labor Relations Board where the activity of the subject matter of the litigation is arguably subject to the protections or prohibitions of the Act. Indeed *Garmon* distinguishes the cases of *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656 (1954) and *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958), in which judgments for damages in suits against unions were upheld, on the theory that in those cases state jurisdiction was exercised only to compensate for "the direct consequences of the violent conduct." The *Rainfair* case held that the impact of federal preemption continues to be operative notwithstanding the occurrence of public disorder in a labor dispute. This Court there held that while a state was empowered to restrain acts of violence and the like it was without power to act with respect to those federally regulated aspects of the dispute unconnected with the violent conduct—that the state was without power to enter "the preempted domain of the National Labor Relations Board." That *Rainfair* was a suit for an injunction and not for damages is not a "significant" basis for distinction. As stated in the *Garmon* case (359 U.S. 236, 246):

> "Even the State's salutary efforts to redress private wrongs or grant compensation for past harm *cannot be exerted* to regulate activities that are potentially to the exclusive federal regulatory scheme." (Emphasis ours)

The *Borden* and *Perko* cases establish the currency of the *Garmon* rule.

That there was violence in the instant case is not denied, though as is discussed elsewhere, union re-

sponsibility therefor is denied. But apart from the question of responsibility it is clear that the greater part of the labor dispute at White Oak did not involve violence but was the result of the interplay of lawful or federally regulated acts of contending economic forces. It is, for example, more than arguably clear that federally protected rights were involved in the inducement of White Oak's employees to strike. This was not the action of a "stranger union", as was found to be the case in *Laburnum*, but the union to which every employee save one belonged. Similar rights are involved with respect to union's grant of relief to employees during the strike. Furthermore the Sixth Circuit, in the guise of applying state law, entered NLRB's protected domain when it impugned the vote cast in the NLRB election, favorable to UMW, and the action of White Oak's employees in demeaning themselves as union members during the strike and accepting union relief, by finding that those employees acted out of fear and not as their actions and their secret ballot cast under federally regulated circumstances would indicate. What are the limitations imposed by the doctrine of federal preemption on a state claim arising out of such a controversy? This Court has not answered this question fully in such a context, though *Garmon* and *Rainfair* may, as we think, answer the question. These cases, at least, point to an indicated conclusion.

In any event the Sixth Circuit does not begin to come to grips with the problem. Its failure to do so leaves outstanding the decision and judgment which rejects by every practical consideration the preemption principle.

The Sixth Circuit, since its White Oak decision, has expressly rejected the preemption principle as enunciated in the *Garmon* case insofar as state law claims are prosecuted in a federal court. See *Morton* v. *Local 20, Teamsters, Chauffeurs and Helpers Union*, 320 F. 2d 505 (1963). In *Morton* judgment was rendered against the union under Section 303 and, on the same facts, under state law. On appeal the union contended that the Federal District Court was without jurisdiction to entertain the claim for damages under state law in that there was no violence involved. In rejecting this contention the Sixth Circuit said: "We are not aware of such a distinction (between cases involving violence from cases which do not) and in fact are unable to appreciate any legal or logical reason for such a jurisdiction distinction." Indeed the Sixth Circuit went on to hold with respect to the state law claim (as well as the federal claim) that the mere absence of violence from the case did not "entitle defendants to absolution from punitive damages."

The *Morton* decision holds that the preemption principle does not bar assertion of a state law claim—even though its assertion in a state court might be barred thereby—if a federal court properly acquires ancillary jurisdiction of the claim. We think this decision, explicit in *Morton* and implicit in White Oak, is wrong. Even conceding applicability of the ancillary jurisdiction doctrine it is clear that the *Morton* decision results from a confusion of the entirely different rules of ancillary jurisdiction and federal preemption. Ancillary jurisdiction has to do with the power to act with regard to a claim under state law. Preemption, on the other hand, questions the applicability of state law. Obviously in a given case a federal court might have

jurisdiction over a state claim because of its pendant relationship to a federal claim. But the existence of ancillary jurisdiction presupposes the existence of a valid and assertable state claim. The doctrine of ancillary jurisdiction does not create or revive a state law claim which, by reason of preemption, could not be asserted in a state court.

It is manifest that the reasoning stated in the *Morton* case was the reasoning followed by the Sixth Circuit in its *White Oak* decision. Indeed the Sixth Circuit in the *Morton* case, cites its decision in the *White Oak* case as authority for its position. And that it followed the same reason expressed in *Morton* is shown in the Sixth Circuit's approval of a verdict for the "total damage sustained" by White Oak "as a result of defendant's acts, both legal and illegal,"[17] in utter conflict with the *Garmon* rule that "only those damages which are the direct and immediate result of violence may be recovered under state law."

The question of preemption posed by this case should be answered by this Court. The case ought not to be turned aside because of the incidents of violence involved. As federal law stands it is the incidents of violence which permit application of state law; and the instant case expands that principle, erroneously, we insist, so as to permit application of state law to all that

[17] The Court charged the jury that if it found that "picketing or other activity was at some times and places carried on in a legal manner and without an improper objective, but at other times the Union employed illegal means or showed . . . that one of its objectives, not merely incidental, was an illegal one, and further that all such acts, legal and illegal, were interrelated and parts of a single effort or campaign . . . *then the defendant would be liable for the total damage sustained by the plaintiff* as a result of the defendant's acts, both legal and illegal" (R. 719).

occurs in a strike and all that results therefrom in terms of both compensatory and punitive damages.[18] The staggering punitive award upheld points up the eclipse of federal law by state law from the standpoint of importance in cases of this type. Where the possibility of such a recovery exists the appeal of settlement through collective bargaining is weak, and the likelihood of prolonged dispute is increased. This is an additional reason why this Court should carefully define the extent of state law applicability in such cases.

The decisions of this Court, we submit, were not intended to be construed as they were in this case. That they have been so construed manifests the need for clarification of the principles involved.

QUESTION NO. 4

Sixth Circuit concluded "The District Court had jurisdiction to entertain a claim for damages under the federal statutes even though such claim was joined with a non-federal action for unlawful interference with business. *Flame Coal Company* v. *United Mine Workers of America*, 303 F. 2d 39 (C.A. 6); *United Mine Workers of America* v. *Osborne Mining Company*, 279 F. 2d 716 (C.A. 6)." However, UMW did not contest jurisdiction of the federal claim *but* did contest jurisdiction of the non-federal cause of action. UMW contended that the ancillary jurisdiction doctrine of *Hurn* v. *Oursler*, 289 U.S. 238, does not permit a federal court to entertain an action because the plaintiff has two causes of action against the same defendant, but to justify assertion of juris-

[18] Punitive damages are not recoverable under federal law, *United Mine Workers* v. *Patton*, 211 F. 2d 742 (C.A. 4, 1954), and the District Court so charged the jury (R. 722).

diction over a federal and a non-federal action both claims must "go precisely rest upon identical facts as to be little more than equivalent of different epithets to characterize the same group of circumstances." (289 U.S. 246).

UMW contends the two causes of action in the present case do not rest upon the "identical facts" but that the jury was permitted to find liability under the state cause of action upon facts that the Sixth Circuit found to be "permissible" conduct under Section 303 upon UMW's Petition for Rehearing (A. 28). However, the jury was permitted to find this conduct a violation of state law. Numerous other facts were submitted to the jury, and approved by Sixth Circuit, as unlawful interference under state law but not within the prohibitions of federal law. Some of these facts are as follows:

(1) The primary picketing by Prater and others of White Oak property on March 16 (A. 5).

(2) The interference with Eddie Ray Franklin on March 16 (A. 6).

(3) Issuance of an ex parte injunction for mass picketing, etc. (A. 7).

(4) The representation dispute with Southern Labor Union (A. 9).

(5) Speeches at Local Union meetings (A. 8).

(6) Maddox remark to one employee that he and his family might get in trouble and suffer bodily harm if Southern won the election (A. 7).

(7) Testimony of State Police concerning anonymous telephone calls by people expressing fear of being harmed (A. 14).

(8) Testimony of one truck driver of being stopped by unknown UMW men in 1955 and made to shovel the coal off his truck (A. 23).

Thus it is apparent that White Oak's claim of a non-federal violation rests upon facts totally unrelated to facts constituting Sixth Circuit's spectacular violence theory of secondary boycott, the basis of the federal violation.

Heretofore, the "importance of the jurisdictional issue involved" has grounded the issuance of certiorari. *Bell* v. *Hood*, 327 U.S. 678, 680. With labor litigation so prevalent and with crowded federal dockets menacing everyday administration of the Courts, Sixth Circuit's expansion of the *Hum* doctrine warrants a review of this decision by this Court and clarification of Federal jurisdiction in the labor field.

CONCLUSION

Petitioner submits this case presents a unique opportunity to decide four of the most important questions pertinent to the difficult labor-management relations field. All of them deal with issues that are extremely important to our entire economy, affect basic economic and civil rights of millions of our citizens and the administration of those rights and to the administration of an important Federal Statute by the courts and the National Labor Relations Board.

Therefore, Petitioner prays that this petition for writ of certiorari should be granted and a writ of

certiorari issue to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit, entered in Case No. 14873 on May 24, 1963.

Respectfully submitted,

E. H. Rayson
R. R. Kramer
904 Burwell Building
Knoxville, Tennessee

Willard P. Owens
900 Fifteenth Street, N. W.
Washington, D. C.

Counsel for Petitioner

APPENDIX

Filed May 24, 1963

No. 14873

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Appeal from the District Court of the United States for the Eastern District, Northern Division, of the state of Tennessee.

WHITE OAK COAL COMPANY, INC., *Plaintiff-Appellee*,

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant*.

Decided May 24, 1963.

Before: WEICK, Circuit Judge, MCALLISTER, Senior Circuit Judge, and BOYD, District Judge.

MCALLISTER, Senior Circuit Judge. This is an appeal by the United Mine Workers of America from a judgment rendered against it in favor of White Oak Coal Company, Inc., in the amount of $185,000 for actual damages, and $125,000 in punitive damages. The verdict of the jury awarded appellee company punitive damages in the amount of $200,000. On remittitur, this award was reduced to $125,000 for punitive damages, and judgment was entered in the aggregate amount of $310,000.

The suit arose out of claimed destruction through dynamiting by the United Mine Workers of the mining machinery and properties of White Oak Coal Company, and unlawful activities of the United Mine Workers in causing large and violent mobs of men to threaten and intimidate employees and persons seeking to do business with the Coal Company, with great resultant loss of business, and loss of valuable leases and improvements; and it was

claimed that the wrongful and unlawful activities and conduct of the United Mine Workers, its officers, agents, representatives, and members were prompted by, and carried out with a wanton, deliberate and malicious intent and purpose to destroy the business and property of the White Oak Coal Company.

Appellant contends that there was insufficient evidence to warrant submission to the jury of the question whether appellant had injured appellee's property within the meaning of federal or state statutes; that the District Court erred in submitting to the jury the question whether the Union violated the criminal statutes of Tennessee; that it erred in the admission of evidence; that it further erred in refusing to grant a motion for a new trial based on the passion, bias and prejudice of the jury; that the evidence was not sufficient to warrant the jury's award of compensatory damages; that the District Court erred in failing to explain the circumstances in which a principal is liable for punitive damages under the doctrine of respondeat superior; that the Court was without power, under the doctrine of federal preemption, to approve, to the extent it did, the jury's award of punitive damages; and that the District Court did not properly invoke the doctrine of pendant jurisdiction, in adjudicating the state law claim.

Having in mind the rule that, on appeal, the evidence and all inferences to be drawn therefrom must be viewed in the light most favorable to the prevailing party and in support of the verdict, the factual background of the case may, as largely stated by appellee, be set forth as follows:

The White Oak Coal Company, hereinafter called the "Company" or "appellee," was a Tennessee corporation organized in 1957. Its president, U. R. Arnold, owned seven of its ten shares, the other three shares being owned by Mrs. Arnold and their two sons, B. J. Arnold and J. L. Arnold.

In March 1959, the Company operated two surface coal mines, on leases, comprising more than six thousand acres of land in Campbell County, Tennessee. The first area was known as White Oak No. 1, a "drag line" operation in the Jellico seam of coal at Sweet Gum Flats in the above-mentioned county. This mine, with high-grade coal, in a basin adjacent to a county highway, was operated on a three-shift basis, with approximately seven men on each shift, comprising a loading shovel operator, a drag line operator, a bulldozer operator, and oilers and helpers. In the Fall of 1958, the Company had begun contour stripping on the other side of the ridge from White Oak No. 1. This latter operation, known as White Oak No. 2, was working with only one shift, but was in a good seam of coal and was profitable.

In 1958, the equipment, utilized in the stripping operation, had been transferred by appellee Company to another company, of which U. R. Arnold and his wife were owners, and which was known as the Clairfield Equipment Company; and the equipment had then been leased back to appellee Company. The Clairfield Company also leased equipment to another strip mine company, known as the B. J. Arnold Coal Company, which was owned by U.R. Arnold's son. Appellee Company was responsible under these equipment leases for damage to, or loss of, equipment. Another company, the Arnold Coal Company, owned by U. R. Arnold and his wife, was sales agent for all Arnold family mines, and received a commission on the sale of the coal, most of which was sold through the Southern Coal and Coke Company, to whose customers it was shipped by rail.

Appellee Company operated two tipples, or facilities for preparation and railroad loading of coal. One of these tipples, which included a cleaning and treatment plant, was located at a place called Anthras, and the other, some two miles away, at a place called Big Nickel. The coal

from White Oak No. 1 was hauled by contract truckers to the Anthras tipple, as was the coal from White Oak No. 2. The truck drivers were employed, controlled by, and paid by the contract truckers, the Snyder Coal Company. A substantial quantity of coal produced by White Oak and affiliated Arnold companies was sold under a term contract by the Southern Coal and Coke Company to the Tennessee Valley Authority. This required that the employees be paid the prevailing Walsh-Healey Wage scale, and they were well satisfied with their wages and working conditions.

In July 1957, near the beginning of White Oak's business operations, there was executed between White Oak and the United Mine Workers, hereinafter called the "UMW," or the "Union," the collective bargaining agreement here involved, known as the National Bituminous Wage Agreement of the United Mine Workers; and appellee Company's employees were, or shortly thereafter became, members of that Union.

In January 1959, the UMW served upon appellee Company, sixty-days' advance notice of the termination of the collective bargaining agreement. At that time, UMW representatives, Prater and Daniel, called upon appellee Company to sign a new collective bargaining agreement. The UMW representatives were thereupon informed by U. R. Arnold, speaking for appellee Company, that he did not believe he could get along with the new agreement, particularly the so-called protective wage features thereof, which required that all coal handled by the Company be mined under the UMW contract; and that while some of the affiliated mine operations were profitable enough to stand the forty-cent per ton payment to the Union's Welfare Fund, others were not.

Under the sixty-day notice, the Union contract with appellee would expire March 15, 1959. Prior to that date, the contract of another operating company, some twelve-

miles away, had expired, and Arnold had heard of the intimidation of truck drivers hauling coal to the tipples of the other mine after that contract had expired, and had also heard that a couple of loads of coal from that mining company had been dumped under the direction of UMW representatives, Prater and Daniel. None of the employees of appellee Company had ever complained about the termination of the UMW contract. Prior to the termination of that contract, Arnold directed that all available coal, at both stripping operations, be hauled to the tipples on the day before the termination of the agreement.

On March 16, the day after the termination of the collective bargaining agreement, Hemsworth, the company superintendent, and six of his stripping crew, reported to work at 7 A. M. The men noticed that when they first arrived, there were two or three strange cars parked along the road by the strip pits. Arnold had instructed the men that if there was any trouble or demonstration by the Union, such as a motorcade, they were to do as they were told and avoid getting hurt. Approximately an hour before the men appeared for work, UMW representative Prater appeared at Snall's Service Station at White Oak. This was about 6 A. M. Prater then organized a motorcade among several hundred of the men who had congregated there. There were about fifty cars and two hundred men in the motorcade. They arrived at the operation of White Oak No. 1 at the time work was to start, and stopped there. UMW representatives Prater and Daniel then got out of the automobiles, and the employees of appellee Company were thereupon told by Prater and Daniel that they could paint and set the pumps, but could not do any work in the mining of coal. Superintendent Hemsworth indicated that he would follow these instructions and the motorcade then drove off. White Oak employees who were there at the time, and others of other shifts, wanted to continue their work in the mining of coal, but were frightened by the UMW activity.

About a week later, when some of appellee's employees were called to work, another motorcade showed up, and almost every day afterward, a few cars with UMWA posters on their bumpers came by, usually led by Prater.

Prior to March 16, truck drivers employed by Snyder Coal Company, and others, had been threatened and told not to haul any non-union coal. The Snyder truck drivers were those who had been engaged in hauling coal for appellee Company.

During the first week of March, two of Snyder's drivers were accosted on the highway as they came with a load of coal from the Anthras tipple of appellee. They were stopped by a large group of men and asked if the coal they were hauling was Union coal, and when the drivers replied in the affirmative, they were told by the men who stopped them that it was not Union coal, and that if they hauled any more, the men would beat them up. At about the same time, another Snyder driver was hauling coal from appellee's tipple toward Knoxville, and encountered a carload of miners who tried to block the road. Shortly after the above incidents, the drivers of the Snyder Coal Company talked the matter over and decided to quit. Three of these drivers who testified said they were scared to go back. One of the two, who had been stopped, tried to haul coal the next day, and was nearly run off a mountain road by a car containing four or five men.

On the morning of March 16, the day after the expiration of the collective bargaining agreement between appellee Company and UMW, Eddie Ray Franklin, a driver of one of the contract truckers, who was frequently engaged in hauling coal from the White Oak mines to the tipple, was questioned by some of the crowd which later embarked on the motorcade, and cautioned not to haul coal from White Oak. He was allowed to move his truck only after explaining that he was going to the B. G. Arnold mine, whose contract was not due to expire until

the following week. Franklin said that he hauled one load from that mine to the tipple and was met by a number of cars with lights blinking, which he felt was a warning and he then quit. Subsequently, U. R. Arnold went to UMW District Headquarters in Middlesboro, with a representative of the Federal Mediation Service, and with other strip mine operators in the area, in order to carry on negotiations with the Union, but nothing ever resulted from this attempt to negotiate. Arnold, and others, caused unfair labor charges to be filed against the Union with the National Labor Relations Board. On April 30, a preliminary restraining order was issued by the United States District Court at London, Kentucky, enjoining UMW and District 19, United Mine Workers of America, and their representatives and agents, from mass picketing and other unlawful activities. Preliminary arrangements with his employees and trucking contractors were thereupon made by Arnold for the resumption of work. However, these arrangements were postponed, when, on May 6, the Gilchrist Company tipples at Jellico were destroyed by dynamite after two days of hauling coal from the Snyder and Randolph mine in adjacent Whitley County, Kentucky, to the Gilchrist tipples, and one of White Oak's regular contract truckers had been shot at on U. S. Highway 25-W after hauling coal from the Whitley County mine to the Gilchrist tipple. *See Gilchrist v. United Mine Workers of America*, 290 F. 2d 36 (C. A. 6). It became impossible to get truckers to haul the coal from the mines to the tipples because of their fear.

In the following month, drivers for Snyder Coal Company were shot at while hauling coal along U. S. Highway 25-W from the remaining Gilchrist tipple even though they had been provided by Ed Daniel, field representative of the UMW, with a "permit" to haul that particular coal over the public highway. During that month, loans by the International Union to District 19 reached the high monthly total of $425,000 of a total for the calendar

year 1959 of $2,471,000. On the night of June 16th, an auger machine of Snyder and Randolph, costing $90,000, and located approximately twelve miles from White Oak, was destroyed by dynamite. See *Gilchrist* v. *United Mine Workers of America, supra.*

The beginning of the Summer of 1959 marked the entry of Southern Labor Union, hereafter also called "Southern," into an organizing drive among the coal strip miners made idle throughout the area by the above-mentioned events. Several of White Oak's employees, including Homer Marcum, became interested in Southern and it appeared that it would seek a contract with White Oak. UMW representative Prater and another member of the UMW, a tipple operator, Tom Taylor, berated Southern in UMW White Oak local meetings, and warned that the Southern Labor Union would be kept out of the area by war if necessary. These Union meetings were held in conjunction with the weekly distribution by the UMW of twenty-five dollar grocery orders to the idle coal miners.

As a result of the activity of Southern Labor Union, a group of armed men led by Hubert Bailey came to the White Oak area from across the border in Kentucky, searching for Homer Marcum with the avowed purpose of beating him up because of his activities in behalf of the other Union, which those men called a "yellow dog" union. Prater had declared that the "Jones boys" were going to take care of Homer Marcum. Hubert Bailey was on one of Prater's committees in Whitley County. Prater paid with UMW funds for meals eaten by Bailey and other members of the armed gang at a restaurant designated for such accommodation by Bailey. Prater also paid with UMW funds for gasoline bought by Hubert Bailey in Jellico. Both Prater and Bailey bought some pistols from the proprietor of the restaurant. During the first week of July, Hubert Bailey stated to a group of the men that had accompanied him: "As long as the Union is paying

us $25.00 a week and furnishing us plenty of dynamite, Arnold is not about to go back to work."

At approximately 1 A. M. Monday morning, July 13, 1959, the strip mining equipment of Arnold, located at White Oak No. 2, consisting of two power shovels and a bulldozer, was destroyed by dynamite. During the week preceding the dynamiting, Ed Daniel, at a night meeting, told about 150 men that they "had been accused of doing the damage around here," and said: "We might as well go full blast ahead."

On August 16, 1959, an election was held among the employees of White Oak Coal Company, by the National Labor Relations Board, upon a proceeding instituted by Southern Labor Union, in which UMW intervened. Taylor Maddox, a field representative of the UMW, told one of the White Oak Coal employees that if Southern won the election, the employee and his family might get in trouble, and suffer bodily injury. The election was won by UMW, the count being fifteen votes in its favor, and eight votes for Southern Labor Union.

At the instigation of officials of Southern Coal and Coke Company, whose main interest was the resumption of shipments under their TVA contract, a new corporation was formed in September, 1959, under the name of Dixie Pine Coal Company. This company signed the contract with UMW and resumed production, using the former White Oak No. 1 employees and equipment. U. R. Arnold was not financially interested in this company and took no part in its management; but his two sons and his daughter were connected with the new company.

In March 1960, there were posted, in the White Oak area, notices signed in behalf of the UMW, stating that the Union would not interfere with White Oak Coal Company's employees. The notice was, by its terms, required to be posted for sixty days, and was posted pursuant to

decree of this Court. Arnold posted some of the notices himself, believing that they would help him in starting back to work without being bothered by disorder. He testified that there was no trouble after this and, in the following month, he organized the Round Mountain Coal Company and reentered the coal stripping business in Whitley County, Kentucky, near Clairfield, Tennessee, where he lived, not far from White Oak. By the following October an election was held among the employees of the Dixie Pine Coal Company—who were former White Oak employees—and the count was nine votes for Southern Labor Union, four for UMW, and two for no union.

White Oak Coal Company offered evidence of net income of $110,905.25 for the 12-month period prior to the termination of its operation as of March 31, 1959. For the 12-month period after March 31, 1959, the evidence showed a loss of $64,324.40. The difference in the two figures for the two consecutive 12-month periods is $175,229.65. There was also evidence that certain of the markets for coal enjoyed by the company prior to the termination of its operation could probably never be recovered.

The book value of the equipment destroyed by dynamite was $31,164.25 after the deduction of accumulated depreciation taken in income tax returns from an original purchase price of $121,317.80. Witnesses for appellee Company testified that the equipment was in an excellent state of repair immediately before the dynamiting, and was worth approximately $100,000; and that after the dynamiting it was worth only what it would bring as junk and spare parts, or a total of $6,000.

Appellant Union contends there was no evidence that it had violated Section 303 of the National Labor Relations Act, 1947, 29 U. S. C. A. 187, in inducing a secondary boycott of appellee Company. It appears that the activities of UMW were directed against both primary and

secondary employers and employees. There was evidence that the union, by off-the-site picketing and other activities, induced and encouraged the employees of a secondary employer to engage in a concerted refusal, in the course of their employment, to transport or handle coal produced by appellee, and that one of the objectives of such action on the part of the Union was to force the secondary employees to quit the work of carrying appellee's coal, or to force appellee to bargain with the Union as the representative of its employees. "Such evidence disclosed the broad pattern of appellant's campaign, with violence sufficiently spectacular and in such proximity to appellee's operation as to become known to secondary employers and their employees and to induce them to discontinue * * * hauling coal" for appellee. *Flame Coal Company* v. *United Mine Workers of America*, 303 F. 2d 39, 43 (C. A. 6). From the evidence, there can be no question that, not only appellee's employees, but also the secondary employers and employees knew all about the incidents occurring at the other locations and mines. They might reasonably regard these incidents as an indication of what might happen to themselves if they persisted in mining or hauling coal for appellee. The incidents with respect to other mines and locations constituted a form of influence by the Union. Such evidence was admissible. *United Mine Workers of America* v. *Osborne Mining Co.* 279 F. 2d 716, 725 (C. A. 6). It is to be noted that, at the time the secondary employees were first interfered with, there was no primary dispute yet in existence, as the bargaining contract between the Union and appellee had not yet expired, and the Union had moved against the trucking of coal by secondary employees, before mining operations, under the bargaining contract, came to an end. Under the circumstances here present the jury could properly find the Union engaged in a secondary boycott. See *Surfire Coal Company* v. *United Mine Workers of America*, 313 F. 2d 108 (C. A. 6); *Flame Coal Company* v. *United Mine*

Workers of America, 303 F. 2d 39 (C. A. 6); *Gilchrist v. United Mine Workers of America*, 290 F. 2d 36 (C. A. 6); *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. 2d 716 (C. A. 6).

Appellant contends that there was no evidence from which the jury could find that the persons who accosted and interfered with the secondary employees were agents of the Union and that the Union was liable for the results of their conduct. The Union was responsible for the acts of their representatives only if the latter were engaged within the scope of their employment or authority; but actual authorization of specific acts was unnecessary. If the evidence disclosed that the purpose of the Union was, by force and violence, to close appellee's mining operations until appellee should sign a labor contract with it, the Union would be liable for the unlawful conduct of its members, under the leadership of its representatives. *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F. 2d 52 (C. A. 6). By virtue of the fact that appellee Company had not signed an agreement with the Union, the Union was essentially engaged in conflict with the Company. *Sunfire Coal Company* v. *United Mine Workers of America*, 313 F. 2d 108, 110 (C. A. 6). It was admitted by appellant, on the trial, that the Union was responsible for the acts of the field representatives, Prater, Daniel and Maddox, and for the acts of the officers of the district union. Prater and Daniel were the officials that had called upon Arnold to sign the new labor contract. Prater had organized the motorcade and was among those who told the employees of appellee Company that they could not mine coal. According to one of the witnesses, Prater said there would be "war," if Southern Labor came into Campbell County.

Prater and Daniel admitted that, prior to the dynamiting of the Randolph mining property, they were down at the tipples at Jellico about midnight, and talked with a

truck driver who was bringing coal from the Snyder and Randolph mines; that Prater asked the driver not to put the coal in the tipple and told him he didn't care where he dumped it. He told the driver that he could dump it anywhere he wanted to and that they had no place picked out for him to dump the coal. The driver then dumped it across the sidewalk and the entrance to the Randolph ramp. Prater said there were two truckloads dumped on the sidewalk while he and Daniel were there. Prater and Daniel were in Jellico the night the tipples were blown up. Daniel was in bed at his home, and Prater was in bed at the Eblen Hotel. They heard the two explosions. Neither one of them got up and went out to see what had happened. Prater "got up at the normal time" next morning and walked down the street to one of the restaurants to have breakfast. Prater and Daniel walked over and saw the dynamited tipples the morning after they were dynamited. Prater made a telephone call to the sheriff. At that time he was not aware who had been arrested. He heard that some UMW miners had been arrested and he was calling "to find out who, and what the charges were, and so forth." Prater had told Randolph that if he didn't sign a contract, he couldn't operate—that they would shut him down. Randolph testified: "I asked him, Mr. Prater, what legal right he had to shut us down, and he said he didn't need a legal right, he took his orders from Washington. And I said 'How will you close me down?' and he said, 'by any means that is required.'"

Prater and Hubert Bailey both bought four pistols from the restaurant proprietor near Jellico. Bailey was authorized by Prater to bring men to the restaurant for regular meals for which Prater would pay each week. Bailey was closely associated with Prater as his agent in arranging what men would be given meals at the expense of the Union; and Bailey, as has been said, declared, on one occasion, that as long as the Union was paying the men

twenty-five dollars a week and furnishing plenty of dynamite, Arnold was not going back to work.

A Trooper of the Kentucky State Police testified that he had received several calls and complaints of different people in the community toward the Kentucky side of Jellico, which expressed their fears of being harmed, and also of instances of a group of men traveling up and down the highway. The Trooper, together with other members of the Kentucky State Police, observed this group of men, which included Hubert Bailey, Johnny Cox, Esom Bryant, Clarence Bryant, and Herman Justice. "They went by the name of the 'Over-all Gang' * * * as they were called." All of these men were those who were eating, week after week, at Malcolm Jackson's restaurant at Union expense at the direction of Prater. Jackson had seen Hubert Bailey, Bob Bailey, Johnny Cox and others on several occasions with pistols.

Field representative Daniel gave "permits" to some truckers to haul certain Union coal. After saying, in a speech, according to a witness, that the Union had been accused of doing damage and blowing up things, Daniel declared that they "might as well go full blast ahead." One witness who took a job with White Oak Coal Company as a night-watchman, related a conversation with Daniel after he took the job in July 1959. According to this witness, Daniel told him: "I would rather you didn't work at that. The boys like you and they don't want to hurt you and don't want to get hurt." When the witness told him that he had to work at something, Daniel said: "Well, you can make more money working with a wrecking crew. * * * One night's work will pay you more than you can work for * * * Arnold for a month." The witness then stated to Daniel: "I told him I didn't want that kind of a job."

The general charge of the Court to the jury on the responsibility of the Union for acts of its agents, i set forth

hereafter, but, with regard to the authority of an agent to appoint a sub-agent of the Union, the Court instructed:

> "Just as the question of whether or not an individual was or was not the agent of the Union is a question of fact for you to decide from direct or circumstantial evidence, so also is the question of authority of such an agent to appoint a sub-agent of the Union. Such authority may be inferred in the same manner as authority to perform other acts for the principal and may be evidenced likewise by direct or circumstantial evidence. * * * Should you determine from the evidence that any person was authorized by Prater or Daniel to engage in activities for the Union, such person was to the extent so authorized also the agent of the Union for whose acts it would be responsible. * * * Declarations or statements of the supposed agent himself as to the extent of agency and the extent of authority is not proof thereof. Indirect proof of agency, and particularly of the scope of employment, may be established by evidence of other facts and circumstances from which it may be inferred."

From the above, and other facts heretofore recited at length, it appears that there was circumstantial evidence from which the jury could find that the unlawful acts in question were carried out at the instigation of the Union. See *Sunfire Coal Company* v. *United Mine Workers of America*, 313 F. 2d 108, 109 (C. A. 6). In our view, the evidence was sufficient to enable the jury to find liability on the part of the Union for the destruction of appellee's property, and damage to its business under the delimiting rule laid down in *Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U. S. 395. See *United Mine Workers of America* v. *Osborne Mining Co.*, *supra*; *Sunfire Coal Company* v. *United Mine Workers of America*, *supra*.

Appellant contends that the evidence was not sufficient to warrant the jury in finding that the Union had injured appellee's business in violation of the law of Tennessee. It was alleged in the complaint that the Union, through its duly authorized agents, organized and brought upon appellee's mining properties, a band of men who, by threats of violence and other unlawful means, prevented its employees from continuing their work; that after this initial work stoppage, the Union, through its officials, agents and representatives, continued its roving, mass-picketing in the area of appellee's operations, and encouraged or induced by these and other means, the employees of other employers to engage in a concerted refusal, in the course of their employment, to handle, transport, or deliver coal produced by appellee; that one of the objectives of the Union was to force and compel other employers and persons to cease doing business with appellee, and to compel it to recognize or bargain with the Union as the representative of appellee's employees, although the Union had not been certified as such representative pursuant to the provisions of the National Labor Relations Act; and that, in furtherance of its plans and efforts to keep appellee out of business, the Union, through its agents, employed or directed for that purpose, caused the properties of appellee to be dynamited and destroyed; that it caused large and violent mobs of men to assemble on and near the premises of appellee, and in other areas in the general vicinity, and repeatedly threatened and intimidated individual employees of the appellee, groups of its employees, and other persons and their employees, seeking and desiring to do business with appellee; and that the result of the foregoing was that the appellee's employees and persons seeking and desiring to do business with it, and the employees of such persons, were alarmed, frightened and intimidated to such an extent that the appellee was unable to continue to operate its business, to do business with other persons, or to fulfill its business commitments and obligations.

The District Court charged the jury that, separate and apart from the prohibition of federal law, it was a violation of the law of Tennessee to interfere maliciously or intentionally with the contractual relations of another, except under certain circumstances, and for certain purposes; that it was not a violation of the law of Tennessee for a Union to indirectly cause harm to an employer in interrupting its business and contractual relations by peaceably inducing its employees to go on strike for the purpose of obtaining better wages and working conditions; and that the jury could not find the Union liable, unless it found that it engaged in acts of violence in breach of the peace relative to appellee's mine, and that such conduct damaged appellee's property, or business, or both. The Court properly charged on the scope of authority of agents; on authorization; on the responsibility of the Union for acts of its agents; the nature of proof of such agency, either by direct or circumstantial evidence, and inferences to be drawn therefrom, as well as on the subject of ratification.

The Union submits that the instant case is distinguishable from our opinions in *United Mine Workers of America* v. *Meadow Creek Coal Company, Inc.*, 263 F. 2d 52 (C. A. 6), *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. 2d 716 (C. A. 6), and *Gilchrist* v. *United Mine Workers of America*, 290 F. 2d 36 (C. A. 6), since a majority of appellee's employees adhered to UMW despite the effort of a rival union. Nevertheless there is evidence that appellee's employees did not quit work because of the failure of appellee to sign a labor contract with the Union; and, as submitted by appellee, the Union's representatives were engaged in a bitter fight with a rival union that was beginning to make some inroads in Campbell County, Tennessee. A federal injunction, at the time, was in force preventing mass picketing, motorcades, dumping coal from trucks, and other activities. From the evidence, the jury could have properly inferred unlawful conduct on the part

of the Union in its conflict with the rival union and with appellee, and could have relied upon the testimony of witnesses quoting Union representatives as announcing such unlawful purposes shortly before the dynamiting.

A review of the record, and especially the facts in evidence heretofore recited, discloses that the proof was sufficient to create an issue for the jury as to whether the activities of the UMW violated the law of Tennessee.

The Union further contends that the District Court erred in instructing the jury with respect to the Tennessee Criminal Statutes. After charging the jury that the Union was privileged to do certain things in causing harm to appellee and interruption of its business as long as the object and means of such activity were proper, it instructed that if either the means or the object were illegal, and appellee were injured as a direct and proximate result of such illegal activity by the Union, the latter would be liable. The Court then went on to enumerate certain conduct made illegal by the Statutes of Tennessee. "The right of civil remedy is not merged in any public offense, but may in all cases be enforced independently of and in addition to the punishment of the latter." Section 39-102 Tennessee Code Annotated. Moreover, if appellee suffered from the Union's violation of statutory provisions, it had a common-law right of action against the Union, as all of the offenses described in the Court's charge are statements of common-law offenses. Violation of the statutes, mentioned by the Court, except the provision which prohibited the transportation or possession of explosives, might not be a common-law offense; but the Court coupled such a violation with the statutes prohibiting two or more persons from entering into an agreement to commit an illegal act capable of producing conditions destructive to life or property by the possession or use of explosives, and that illegal act would be a common-law offense against whoever was injured as a result. The District Court correctly charged the jury as to the law of Tennessee.

Appellant submits that it was reversible error to permit, over its objection, Mr. Arnold, President of appellee Company, to relate that certain notices had been posted concerning what UMW would do in connection with employees in the future. This notice had been posted by the UMW in March 1960, pursuant to certain proceedings, in which an unfair labor practice complaint was issued against the UMW by the National Labor Relations Board. As as result, a settlement agreement, or stipulation, was entered into on which a decree of this Court was rendered providing that the notice would be posted stating that: "We (UMW) will not restrain or coerce employees of G. and R. Coal Company, Inc., Dean Coal Company, Inc., White Oak Coal Company, Inc., Snyder and Randolph Co. Inc., Sunbright Mining Co. Inc. and Whaley Coal Company, or any other employees * * * in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act." The stiuplation on which the settlement was entered provided:

> "This stipulation shall not be admissible in evidence in any court, administrative proceeding or other tribunal or any other proceeding except for unfair labor practice proceedings brought before or by the National Labor Relations Board."

Appellee, at first sought to introduce the notice which was posted, and the trial judge held that, while it was admissible, he was of the view that, in the light of the stipulation, the notice should not be introduced in evidence. The Court said:

> "The court suggested to you * * * that you not put them in on account of the stipulation, but the court must follow the law as he sees it on the questions of evidence. Now they objected to this evidence for the reason that the stipulation stated that it wouldn't be introduced in evidence. Now the court holds that that objection is not good as a matter of

law, because this is a public document, and if you insist on filing it as a part of this record, the court holds that you can, but the court suggests to you that you do not do it as a matter of public policy on account of that stipulation."

Counsel for appellee Company, in his examination of Mr. Arnold, asked:

"Q. Had there been—about that time just before that time, were certain notices posted concerning what the United Mine Workers would not do in connection with employees?

A. Yes, sir. * * *"

It is the above question and answer upon which appellant Union bases its claim of prejudicial reversible error. A continuation of this testimony is as follows:

"Q. Mr. Arnold, did you personally put up any of these notices?

A. Yes, sir.

Q. Where were they posted, if you know?

A. Just around public places. * * *

Q. Mr. Arnold, why were you interested in posting these notices?

A. For the reason that I figured we could start—I could start back to work without being bothered. * * *

Q. Well, did you start back to work without being bothered after that?

A. Yes, sir, we formed the White Oak—I mean the Round Mountain Coal Company and went back to work.

Q. Has there been any report to you on any—or do you know of any trouble, that is, dynamiting or intimidations of employees, or trucking employees since that date?

A. No, sir.

Q. You haven't heard of any?

A. No, sir, and we haven't had a bit of trouble."

In its complaint appellee set forth that because of the wrongful conduct of appellant Union, appellee was unable to continue to operate its business, to do business with other persons, or to fulfill its business commitments and obligations.

In its answer appellant set forth:

> "Defendant specifically denies that plaintiff was damaged by reason of an interruption of its business in any amount; or that it lost valuable leases and improvements thereon to its damage."

Counsel for appellee submitted that the notice, having the signature of a UMW officer, gave credence to the testimony of Mr. Arnold as to why he then thought he could go back in business after the notice had been posted in March 1960. The Court then inquired from counsel for appellee why, if he was not claiming damages after March 1960, what effect the notice had with regard to his going into business after the posting of the notices. Counsel for appellant then stated: "I think it lends support to the idea that he was not in bad faith, he was not refusing to work in good conscience. He waited until this defensive action was taken by the Union before he went back to work. And we claim it lends credibility to the proposition that he was not idle intentionally, that he was in good faith and in good conscience in not trying to work before that time." The Court then asked counsel for appellant Union whether he claimed that Mr. Arnold and appellee Company were not acting in good faith in not returning to work before the posting of the notice. In reply, counsel for appellant Union stated: "We take the position that he did not make a reasonable effort to reopen his mine. I do not say he was loafing or any of that, * * * but we do think he did not make a reasonable effort to do what he ought to do to minimize damages or reopen that mine. * * *" The trial judge then said: "I think the proof is competent as bear-

ing on the question of why he did not go back to work during that period." The trial court therefore admitted the evidence not only as bearing upon the state of mind of Mr. Arnold and his employees with respect to labor relations in that coal field area, and to show that it was a basis for Mr. Arnold's contention that he was in fear and his employees were in fear, but also because the proof was competent as bearing on the question why Mr. Arnold did not go back to work until the posting of the notice. While ruling that the evidence was admissible, the Court gauged its relatively minor importance by observing: "Now this is not going to be determinative in the lawsuit."

We are of the opinion that the proof was properly admitted. The trial court stated that if the notice which had been posted had been offered in evidence (which it was not), it would feel bound to admit it, in spite of the stipulation above mentioned. We concur in this view.

The notices had been posted publicly. They were for the purpose of informing former employees and future employees of appellee and others, that they would not be coerced in the future by the UMW. Mr. Arnold, himself, posted a number of the notices for this purpose. The notices, themselves, were public documents in a much broader sense than a document filed in a public office, for they were to be seen and read by all of the members of the mining community who were interested in working in the various mines. When appellant Union insisted that Mr. Arnold did not make any reasonable effort to reopen his mine after the strike and thereby made no effort to minimize his damages, he was entitled to answer this charge and to show why he did not go back to work in the intervening period, and also why he finally did go back to work. Mr. Arnold's testimony that certain notices had been posted stating what the UMW would do in connection with employees, and that he himself had helped post such notices, was properly admitted. *Bausch Machine Tool*

Company v. *Aluminum Company of America*, 79 F. 2d 217 (C.A. 2) cited by appellant is not applicable. There, in a civil antitrust case, plaintiff attempted to question a witness before the jury as to a consent decree rendered in an antitrust proceeding which had been brought on behalf of the government. The Court held that Title 15, USCA Section 16, made a consent decree, in such a case, inadmissible in evidence.

Appellant contends further that the District Court committed reversible error in permitting the jury to consider evidence of incidents of threats and violence which took place in 1955 and 1956, which was three or four years prior to the incidents giving rise to the present case. In this case, two of the truck drivers hauling coal for appellee Company had been stopped by pickets and told that if they hauled any more coal from appellee's tipple, things would "get rough." One of these truck drivers testified that during the 1955 "No contract—No work" campaign of the Union, he was hauling coal for the same employer when about forty UMW men stopped him on the highway and made him shovel a ten-ton load of coal off his truck. One of the driver's fellow employees testified that the driver had told him of this incident in connection with their being stopped in 1959 and their decision to quit work. These two witnesses also testified that they had heard that John Van Huss, a mining operator, was whipped, kicked, beaten and partially buried, in the 1955 trouble. Van Huss himself actually testified to these facts in the instant case. Although three or four years had elapsed, this unlawful conduct had occurred during the "No contract—No work" campaign, which was the last such preceding campaign before the one in 1959. These, and similar incidents, were relevant as showing the fear of the employees in preventing them from continuing their work and were relevant to show the fear of Arnold himself, which prevented him from continuing with his mining operations. Because these incidents were similar to those occurring in the last

preceding "No contract—No work" campaign, they were relevant to the point at issue and were not too remote as evidence which caused such fears and cessation of work. As Judge Leslie R. Darr said in *Phillips* v. *Local 662, Radio and Television Engineers*, 192 F. Supp. 643, 645:

> "In determining whether there may be threats or coercion under a given situation, the power and influence lying behind the conduct are important. There may be no bother from the acts or words of a weak person but there might be forced results from acts or words of a strong and influential person."

In *United Construction Workers* v. *Laburnum Construction Corporation*, 194 Va. 872, aff. 347 U.S. 656, the Court said:

> "The admissibility of the evidence of the reputation of Breathitt county, Kentucky, the site of the plaintiff's work and of the disturbance, for unrestrained lawlessness is governed by the same principle. It was corroborative of evidence on behalf of the plaintiff that there was real cause for its employees being afraid to return to their work."

With regard to the admissibility of evidence showing that a party committed another offense at a different time and place, the United States Court of Appeals of the Third Circuit, in *United States* v. *Stirone*, 262 F. 2d 571, 576-577, said:

> "The question of the admissibility of evidence of offenses other than the one for which the defendant is on trial is a very difficult one. • • •
>
> "So, the general rule, as stated by most courts, is that evidence of other offenses is inadmissible in a criminal prosecution for a particular crime. This rule is qualified by a number of exceptions stated in terms

of the capacity of the evidence to prove some specific fact or issue such as intent, plan, scheme or design. E.g., *United States* v. *Klass*, 3 Cir., 1948, 166 F. 2d 373, 377; *United States* v. *Bradley*, 3 Cir., 1945, 152 F. 2d 425. But since the range of relevancy, other than for the purpose of showing criminal propensity, is almost infinite, we think the rule may be phrased a little less mechanically. Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime.

"Of course, the trial judge may, in the exercise of his sound discretion, exclude evidence which is logically relevant to an issue other than propensity, if he finds that the probative value of such evidence is substantially outweighted by the risk that its admission will create a substantial danger of undue prejudice. *United States* v. *Feldman*, 2 Cir., 1943, 136 F. 2d 394, 399; *United States* v. *Shurtleff*, 2 Cir., 1930, 43 F. 2d 944, 947-948. See Uniform Rules of Evidence 55, 45; Model Code of Evidence Rule 303 (1942). But it must be borne in mind that the greater the probative force of the evidence, the more likely it is to be prejudicial to the party against whom it is offered."

In *O'Dell* v. *United States*, 251 F. 2d 704, 707, the Court said:

"Relevant evidence which tends to prove a material fact in the case on trial is admissible even though it incidentally shows that the accused committed another offense at a different time and place. The test in measuring the admissibility of evidence is whether it is material to any issue in the case on trial. If so, it should be admitted even though it tends to establish the commission of another crime. *Suhay* v. *United States*, 10 Cir., 95 F. 2d 890, certiorari denied 304 U.S. 580, 58 S. Ct. 1060, 82 L. Ed. 1543; *Troutman* v.

United States, 10 Cir., 100 F. 2d 628; *Crapo* v. *United States*, 10 Cir., 100 F. 2d 996; *Legatos* v. *United States*, 9 Cir., 222 F. 2d 678."

The admission of the evidence in question was not prejudicial, reversible error.

Evidence of many of the incidents of threats and violence above stated was relevant not only upon the issues heretofore mentioned, but also to show a common plan or scheme, as an exception to the general rule excluding proof of similar offenses showing propensity.

After the verdict, appellant moved for a new trial and, as one of its grounds, stated that the amount of the verdict manifested passion, prejudice, and caprice, and that the District Court erred in permitting the jury to award punitive damages. The District Court held that the verdict, as to the punitive damages, was excessive, and ordered a new trial, unless within ten days, the appellee should file in the office of the Clerk, its written consent to the remittitur of the punitive award in the amount of $75,0000, which would reduce such punitive award to $125,000. Such remittitur was filed.

There was no mention of any appeal by appellee, to passion and prejudice. The District Court observed that if the award of the jury was grossly excessive or the result of passion or prejudice, it should be set aside; but he provided for the remittitur because, as he stated, he was surprised at its amount in that it was larger than any other punitive award in his memory; and that, if upheld, it might result in an injustice to the appellant. On a review of the record, we are of the opinion that it was not error for the District Court to refuse to strike out entirely the award for punitive damages; that it was proper, under the circumstances, to reduce the award by $75,000; and that the final award for punitive damages could not be held by us to be excessive. See *May* v. *Ellis Trucking Company*, 243 F. 2d 526 (C.A. 6); *Neese* v. *Southern Railway Company*,

350 U.S. 77. As to the award of compensatory damages, it was sustained by the evidence which has been heretofore related.

Appellant argues that Section 303 of the National Labor Relations Act of 1947 preempted the entire field of this controversy by providing a remedy for so-called secondary boycott activity, thereby precluding a right to recover punitive damages which were perpetrated in violation of state law. The District Court had jurisdiction to entertain a claim for damages under the federal statutes even though such claim was joined with a non-federal action for unlawful interference with business. *Flame Coal Company* v. *United Mine Workers of America*, 303 F. 2d 39 (C.A. 6); *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. 2d 716 (C.A. 6).

We find no reversible error in the instructions given by the District Court to the jury. Other contentions discussed in the briefs are unnecessary to decision.

In accordance with the foregoing, the judgment of the District Court is affirmed.

Judgment

(Filed May 24, 1963)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ THOMAS F. MCALLISTER
Senior Circuit Judge.

Order

(Filed July 22, 1963)

A petition for rehearing having been filed by appellant in the above cause, and the Court being duly advised, it is hereby ORDERED that, for the purpose of clarification, the sentence commencing on the tenth line from the bottom of page 9 of the printed opinion be stricken and, in its place, the following sentence be substituted:

> It is to be noted that the secondary employees were first interfered with before mining operations under the bargaining contract came to an end and before the start of any nearby primary picketing activity, of which the first interference could be considered an incidental and permissible part. Cf. *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO,* v. *N.L.R.B.* 366 U.S. 667.

It is further ORDERED that the petition for rehearing be denied.

Approved for entry:

/s/ THOMAS F. MCALLISTER
Senior United States Circuit Judge

Labor Management Relations Act, 1947

Section 303 [29 USCA 187] *Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages*

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or

work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under sub-chapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefore in any district court of the United States

subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

* * * *

Labor Mangement Relations Act, 1947

29 U.S.C. 185. *Suits by and against labor organizations —Venue, amount, and citizenship*

* * *

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Norris LaGuardia Act

29 U.S.C. 106, 47 Stat. 71: *Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members and agents*

No officer or member of any assocation or organization, and no assocation or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts or of ratification of such acts after actual knowledge thereof.

Office-Supreme Court, U.S.
FILED
DEC 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 556

UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

WHITE OAK COAL COMPANY, INC., *Respondent*

BRIEF OF RESPONDENT

In Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

ROBERT S. YOUNG, JR.
HOWARD H. BAKER, JR.
1000 Burwell Building
Knoxville, Tennessee
Counsel for the Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement of the Case	3
Kind of Action and Judgment	3
The Facts	4
Summary of Argument	4
Argument	5
Question No. 1: The Court of Appeals Sustained	
Question No. 1: The Court of Appeals Sustained the Award of Damages for Violation of Section 303 of the Labor Management Relations Act Not Merely upon Spectacular Violence Involving Mining Operations of Other Employers But upon Clear Proof of the Occurrence of Prohibited Activity Interrupting the Transportation of Coal Produced by Respondent	5
Question No. 2: The Damages to the Business and Property of White Oak Were Not the Result of a Strike or Any Other Voluntary Conduct on the Part of Its Employees Who Were Memebers of UMW But Were Caused by the Wrongful Acts of UMW and of Persons for Whom It Was Legally Responsible	15
Question No. 3: The Claim for Violation of the Law of the State of Tennessee Based upon Wrongful Conduct Also in Violation of Section 303 of the Labor Management Relations Act Is Not Displaced by the Pre-eminence of the National Labor Relations Board and the Federal Law	25
Question No. 4: Under the Doctrine of Pendent Jurisdiction the District Court Was Empowered to Entertain the Claim for Violation of the Law of the State of Tennessee Along with the Claim for Damages under the Labor Management Relations Act	29
Conclusion	31

INDEX OF CITATIONS

Cases:	Page
Allen v. United Mine Workers of America, 319 F. 2d 594 (C.A. 6)	10
Association of Journeymen v. Borden, 373 U.S. 390 (1963)	25, 27
Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395	22
Flame Coal Company v. United Mine Workers of America, 303 F. 2d 39, 43 (C.A. 6) (cert. denied 371 U.S. 891)	6, 7, 10, 13, 30
Gilchrist v. United Mine Workers of America, 290 F. 2d 36 (C.A. 6) (cert. denied 368 U.S. 875)	30
Iron Workers Local 207 v. Perko, 373 U.S. 701 (1963)	25, 26
Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. National Labor Relations Board, 366 U.S. 667	11, 13
Morton v. Local 20 Teamsters, Etc., 320 F. 2d 505	28
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	25, 26, 27, 28
Smith v. Evening News Association, 371 U.S. 195	27, 29
United Mine Workers of America v. Meadow Creek Coal Company, 263 F. 2d 52 (C.A. 6) (cert. denied 359 U.S. 1013)	30
United Mine Workers of America v. Osborne Mining Company, 279 F. 2d 716, 725 (C.A. 6) (cert. denied 364 U.S. 881)	6, 7, 13, 30
Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957)	25, 26

Statutes:	
Labor Management Relations Act of 1947:	
Section 301	27
Section 303	5, 10, 14, 27, 28
National Labor Relations Act:	
Section 8(b)(1)(a)	14
Section 10(j)	14
Tennessee Code:	
Section 39-2303	24
Section 39-2805	24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 556

UNITED MINE WORKERS OF AMERICA, *Petitioner,*

v.

WHITE OAK COAL COMPANY, INC., *Respondent*

BRIEF OF RESPONDENT

In Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

QUESTIONS PRESENTED

1. Should a judgment for damages awarded under Section 303 of the Labor Management Relations Act be reversed because the District Court admitted evidence of, and the Court of Appeals considered as a "form of influence" violative of the Act, violence occurring at other mines, which was in addition to evidence that the union "induced and encouraged em-

ployees of a secondary employer to engage in a concerted refusal, in the course of their employment, to transport or handle coal produced by (respondent) and that one of the objectives of such action on the part of the Union was to force the secondary employees to quit the work of carrying (respondent's) coal or to force (respondent) to bargain with the Union as such representative of its employees"?

2. Is a jury verdict of labor union responsibility and a judgment for damages based thereon proper in an action under Section 303 of the Labor Management Relations Act of 1947 and the law of the State of Tennessee, where such responsibility was based in part upon the conduct of union members or of unnamed persons and not entirely on conduct of acknowledged agents or employees of the union?

3. In a suit for damages under state law by an employer against a labor union, is a court empowered, notwithstanding the principles of federal pre-emption, to render judgment against the union for compensatory damages based upon the total loss sustained by the employer, and for punitive damages, on account of violence and disorder for which the union is held responsible occurring during its course, where it affirmatively appears that a majority of the plaintiff's employees were members of the union and that the employer's inability to operate and the consequent losses were the result of union activity having among its objectives the forcing of plaintiff to sign a union contract?

4. In an action for damages against a labor union in which plaintiff contends that certain acts which occurred during a labor dispute constituted violations

of Section 303 of the Act and that the union's entire course of conduct during the dispute also constituted wrongful interference with plaintiff's business in violation of state common and statute law, did the District Court have jurisdiction to determine liability under the common law or non-Federal grounds asserted in support of the single cause of action?

STATEMENT OF THE CASE

Kind of Action and Judgment

This is an action for damages to the coal mining business and property of White Oak Coal Company[1] against the United Mine Workers whose conduct is alleged to have been unlawful under Section 303 of the Labor Management Relations Act and under the common law and statutory law of Tennessee.

The jury, by its verdict in the form of answers to four separate questions found that the defendant or persons for whose actions it was legally responsible engaged in activities which damaged White Oak's business in violation of the Labor Management Relations Act and unlawfully interfered with or damaged plaintiff's business or property in violation of the applicable state law, that the amount of damages sustained was $185,000.00 and that the unlawful acts in violation of the state law having been done wantonly or with malice, White Oak should be allowed punitive damages in the amount of $200,000.00 (R. 26). Judgment was entered accordingly (R. 27) and subsequently the District Court overruled UMW's motion for judgment n.o.v. However, being of the opinion that the verdict as to punitive damages was excessive, the District

[1] The terminology used herein with reference to the parties will be the same as that used in the petition.

Court ordered a new trial unless White Oak accepted a remittitur of $75,000.00 (R. 41-43). The remittitur was accepted and UMW appealed (R. 44). On May 24, 1963, the Court of Appeals for the Sixth Circuit affirmed, and on petition to rehear changed a sentence in its opinion for purposes of clarification and denied the petition to rehear (A. 28).

The Facts

The facts of this case are extensively set forth in the opinion of the Court of Appeals; and since UMW on this appeal does not argue that any of the statements of fact appearing in the opinion are not supported by the record and does not present questions involving any particular factual situation but only a broad attack on the sufficiency of the proof generally, there appears to be no need for an additional statement of the material facts. However, in view of the petitioner's contentions that the Court of Appeals overlooked or failed to consider or did not point out certain additional testimony related to particular matters and in view of the fragmentary nature of the factual summary contained in the petition, amplifications and explanations of the Court's factual statements are appropriate and will be made in the argument concerning the questions to which such facts are related. Otherwise, respondent adopts the statement of facts contained in the opinion of the Court of Appeals.

SUMMARY OF ARGUMENT

The issues of the liability of UMW under Section 303 of the Labor Management Relations Act and under the law of Tennessee were properly submitted to the jury, there being ample evidence of unlawful secondary boycott and of interrelated violations of the law

of Tennessee on the part of persons acting as authorized agents on behalf of UMW, with or without the testimony concerning violence occurring contemporaneously at other nearby mines. The two questions presented for review by the petition in regard to the liability of UMW raise no real question of substantive law or procedure but a re-argument of the asserted insufficiency of the plaintiff's evidence and an appeal for further consideration of the defendant's evidence in conflict therewith.

The principle of federal pre-emption of the field of labor relations announced in previous decisions of this Court does not remove from the jurisdiction of the United States District Court an action such as this for damage caused by union activity which was unlawful under both federal and state law, was characterized by violence and was initially referred to and enjoined by the National Labor Relations Board.

ARGUMENT

QUESTION NO. 1

The Court of Appeals Sustained the Award of Damages for Violation of Section 303 of the Labor Management Relations Act Not Merely Upon Spectacular Violence Involving Mining Operations of Other Employers But Upon Clear Proof of the Occurrence of Prohibited Activity Interrupting the Transportation of Coal Produced by Respondent

In presenting the question of liability of UMW for violation of Section 303 of the Labor-Management Relations Act, the petitioner has undertaken to transform a question of fact into a question of law by misconstruing both the holding of the Court of Appeals as to the evidentiary basis of the liability and a sentence in the opinion concerning the legal significance of the priority in time of certain activity. The super-

ficial plausibility of the petitioner's argument arises from the interposition by the Court of Appeals, in the paragraph holding that certain interferences with truck drivers constituted a secondary boycott, of language from opinions in previous cases dealing with the relevancy to the issue of liability of evidence of violence occurring at other mines, which question was also raised in this case.

Specifically in response to the argument on behalf of UMW that there was no evidence to support a finding of violation of Section 303, the Court of Appeals in clear statute-related language held:

> "There was evidence that the union, by off-the-site picketing and other activities, induced and encouraged the employees of a secondary employer to engage in a concerted refusal, in the course of their employment, to transport or handle *coal produced by appellee*, and that one of the objectives of such action on the part of the Union was to force the secondary employees to quit the work of carrying *appellee's coal*, or to force *appellee* to bargain with the Union as the representative of its employees." (A. 11) (Italics supplied)

The facts upon which this holding as to liability for the inducement of truck drivers hauling coal from White Oak's operation before the commencement of picketing directed against respondent's own employees are set forth earlier in the opinion (A. 6).

After the above-quoted holding, the opinion of the Court of Appeals proceeds with a quotation from *Flame Coal Company* v. *United Mine Workers of America*, 303 F. 2d 39, 43 (C.A. 6) (cert. denied 371 U.S. 891), and language taken from *United Mine Workers of America* v. *Osborne Mining Company*, 279

F. 2d 716, 725 (C.A. 6) (cert. denied 364 U.S. 881), holding that evidence of violence occurring contemporaneously at other mines in the area is competent as constituting an illegal "form of influence and persuasion". There follows a simple statement that such evidence of violence occurring at other places was admissible. Then the Court, obviously referring again to the interference with truck drivers hauling White Oak coal, added a statement addressed to the contention of UMW that such interference with the truck drivers was a part of the Union's primary picketing effort directed against White Oak's own employees. This is the sentence that was changed upon petition to rehear and is the one misconstrued by petitioner as will be hereinafter noted.

In view of the extended argument of UMW about the evidence of violence at other places, the background of the controversy over this testimony should be considered. In the Court of Appeals UMW argued, under its Question No. 6, that the District Court committed reversible error "in admitting in evidence a mass of testimony concerning unrelated incidents of violence and threats of violence which occurred in 1959". By Question No. 5, complaint was made of the admission of evidence of events which took place in 1955 and 1956, and this subject is taken care of by the Court of Appeals later in the opinion (A. 23-26). It is to Question No. 6 as to the admissibility of evidence of the 1959 incidents that the quotations from the *Flame* and *Osborne* cases are addressed.

This evidence of events taking place at other mines in the area was introduced on behalf of White Oak as relevant on several grounds, only one of which was that such events influenced the conduct and the decisions of White Oak management, its employees and

the employees of employers doing business with White Oak and explained their subsequent conduct. UMW's acknowledged representatives, Prater, Daniel or Maddux, having been identified with most of the events, evidence thereof was also urged as admissible on the ground that it revealed UMW participation in the intensive and often violent campaign against coal producers, truckers and other persons, thus showing a common design or scheme of which similar activity of unnamed persons directed at White Oak and persons doing business with it was a part. This ground is noticed later in the opinion of the Court of Appeals after the Court dealt at some length with the admissibility of evidence of the two events that took place in 1955 (A. 264).

In this connection response should be made to one of the comments of UMW impugning the factual statements in the opinion of the Court of Appeals. It is said on page 14 of the petition that the Court of Appeals approved the introduction of evidence of the beating of a non-union operator in 1955 "notwithstanding the absence of UMW representatives or of a then current union dispute with that operator". The operator, Van Huss, testified that several months before the occurrence UMW Representative Ed Daniel had visited his mine and tried unsuccessfully to get him to sign a UMW contract and that one of the men in the mob involved in the beating incident referred to this fact (R. 262-264). Tom Taylor, one of those present, was president of a local UMW union and not a field representative of the international as were Daniel and Prater, but it was certainly proper for the jury to infer that he was acting in behalf of UMW in 1955 and 1959. In the 1959 campaign he helped

Prater close down the Gilchrist operation (R. 282-283); and along with Prater made threatening speeches to White Oak union members during the summer about the rival union (R. 207, 378, 411).

Although UMW does not question the *admissibility* of the evidence of the 1959 "spectacular violence" in this court as it did in the Court of Appeals, it should be pointed out that such activity, as contrasted with the more conventional means used by a labor union in formulating and negotiating a change in a collective bargaining contract, was effective to, and undoubtedly intended to, influence and induce action or inaction on the part of not only the primary employer but those seeking to do business with him. The word "spectacular" means "unusual display" and this characteristic of the UMW campaign was, indeed, significant. It represented more than a mere hope that employees other than coal miners would stay off the roads. Truck driver Eddie Ray Franklin quit hauling coal from the B. G. Arnold mine when the lights of the cars in the motorcade were blinked on and off at him (R. 322); truck drivers Ben West and E. H. Harris quit hauling coal from other mines when the trucks they were driving were shot up at different times and places on highway 25-W (R. 383-385, 401); Spradlin quit hauling coal when dynamite was exploded in his front yard at night (R. 392). White Oak could not get truckers to resume the hauling of coal from the strip pits to the tipples, which was indispensable to the operation, and employer Alexander testified that the reason he quit furnishing trucks was that he and his drivers were scared (R. 94, 345, 367). The drivers of employer Snyder, who was buying coal at the White Oak tipples and hauling it to his yards at Knoxville,

quit because they were stopped and threatened and also undoubtedly because of what was happening to others (R. 146, 365). There is no identification of the people who shot at the truck drivers, but UMW members and acknowledged agents were connected with other instances of interferences with and intimidation of truck drivers during the same period of time and with the same effect; and for the reasons stated and under the authorities cited by the Court of Appeals such evidence was properly admitted.

Whether or not the "spectacular violence" at other mines was the only conduct that could be considered violative of Section 303 in the *Flame* case from which the phrase was quoted, there was certainly in this case interference with the truckers hauling White Oak's coal that clearly amounted to a secondary boycott. The tactics were the same as those shown in the case of *Allen* v. *United Mine Workers of America*, 319 F. 2d 594 (C.A. 6), involving coal truckers in an adjoining Tennessee county. In that case and in this UMW representatives, agents and members aggressively went after the truck drivers and intentionally forced them to cease hauling non-union coal. As stated, the employers who ceased doing business with White Oak did so not only because, as UMW here contends, they heard about violence involving other people, but also and mainly because their truck drivers were, themselves, threatened and intimidated and quit work, as found by the Court of Appeals.

To eliminate from consideration evidence of such interferences with the hauling of coal and the above-quoted holding of the Court of Appeals as a basis of liability under Section 303, petitioner argues that the effect of the change in the sentence of the opinion

upon rehearing, above referred to, was a holding that this first interference with the trucking of White Oak's coal was legally permissible as incidental to *subsequent* primary activity. This contention is set forth first in the statement of the case on page 6 of the petition and is repeatedly argued in an effort to isolate "spectacular violence" as the only basis for a finding of liability under the federal law. It makes no sense whatever.

A brief explanation of the history of this question in this litigation is also worthy of consideration. In its briefs in the Court of Appeals petitioner took the position that the stopping of the truck drivers hauling coal purchased by their employer from White Oak's Anthras tipple was a part of primary picketing necessarily inconveniencing and influencing those attempting to do business with White Oak. The case of *Local 761, International Union of Electrical, etc. Workers* v. *NLRB*, 366 U.S. 667, was relied on as authority for this proposition. In the original brief the argument was stated this way:

> "The incident regarding Dockery and West occurred at the entrance to the Anthras tipple where four or five White Oak employees worked, thus such activity could only be 'primary' and not 'secondary'. The object of the picketing obviously was directed at White Oak and not Snyder Coal Co. Indeed the record does not disclose that the so-called pickets even knew or could know that Dockery and West did not work for White Oak. In any event, to hold such activity unlawful would be 'a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's every day operations'. *Local 761*, at page 681."

Respondent's brief pointed out that at the time the trucks were stopped at a highway intersection some several miles from the White Oak tipple (R. 202, 519-520), no effort was being made to stop the tipple operation because the UMW contract was not scheduled to expire until the end of the week. It was in this connection that the Court of Appeals noticed that there was no primary dispute at this first time that the secondary employees were interfered with; although elsewhere in the opinion it was stated that Arnold of White Oak had told UMW representatives, Prater and Daniel, that he could not sign the amended wage agreement and had announced his intention to operate without a UMW contract after its expiration. By petition to rehear, UMW argued that if the Court of Appeals was indicating that there was no primary dispute there could be no secondary activity. In connection with this stopping of trucks of other employers it was again argued:

> "This was 'primary' picketing declared permissible in *Local 761, Int'l Union of Electrical Workers* v. *NLRB*, 366 U.S. 667. Pickets are not required to trespass on the employer's property to keep picketing in the primary category."

and

> "Though this Court herein has had its attention called to *Local 761*, and UMW has urged in this case, as it did in the *Flame* and *Sunfire* cases (which the Court has cited in its opinion) that *Local 761* rejected the charge of a secondary boycott, this Court has consistently failed to explain why the Court is of the belief that that case is inapplicable."

In response evidently to this argument the change was made by the Court of Appeals in the one sentence of its opinion as follows:

> "It is to be noted that the secondary employees were first interfered with before mining operations under the bargaining contract came to an end and before the start of any nearby primary picketing activity, of which the first interference could be considered an incidental and permissible part. Cf. *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *N.L.R.B.*, 366 U.S. 667."

Local 761 deals with the question of when picketing activity of certain types and at certain locations *concurrent* with lawful primary activity constitutes a violation of the secondary boycott provisions of the Labor Management Relations Act, the literal language of which is not to be construed too broadly. Thus if there is no picketing of the primary employer at the time the persons seeking to do business with the primary employer are interfered with, then, of course, the doctrine of *Local 761* is not significant. How the above quoted sentence of the Court of Appeals can be construed otherwise is not understandable.

Petitioner argues that previous decisions of the Court of Appeals, although not following "the teachings of this Court", did not "encompass the spectacular violence theory" and that therefore the instant case "represents a broad expansion of the secondary boycott provisions". Of course the very phrase "spectacular violence" was quoted from the *Flame* case and the language of the holding of the Court of Appeals in this case is almost exactly that of the *Osborne* case. Petitioner means, perhaps, that in the previous cases

the violence was not the only evidence of secondary boycott. As hereinabove pointed out, the violence was certainly not the only union activity in this case in violation of the secondary boycott provision of the Federal Act.

Petitioner also says that the decision of the Court of Appeals "ignores the decisions of this Court that primary activities are protected by the Act" and that there are needed "a greater clarification as to what are permissible acts under Section 303" and "evidentiary guide lines". There could hardly be imagined a case less worthy of this Court's attention to the clarification of the lines of demarcation between legal and illegal picketing, coercion and persuasion. The only UMW activity even arguably legal, protected or permissible was that directed at the primary employees, those working for the coal operators; and it was this that the National Labor Relations Board, upon charges filed by White Oak and others, found to be in violation of Section 8(b)(1)(a) and enjoined under Section 10(j) of the National Labor Relations Act (R. 79, 92). On April 30, 1959, UMW was, by order of the United States District Court for the Eastern District of Kentucky, enjoined from, among other things, mass picketing, blocking roads or other entrances to mines, or in any other manner restraining or coercing employees in the coal industry or other employees in the exercise of their rights to self organization (R. 92). Dynamite and shooting from ambush turned out to be just as effective, but the obviously more remote relationship to the ordinary violations of Section 303 presents to this Court no reason for an elaboration of the difference between lawful primary activity and an unlawful secondary boycott.

QUESTION NO. 2

The Damages to the Business and Property of White Oak Were Not the Result of a Strike or Any Other Voluntary Conduct on the Part of Its Employees Who Were Members of UMW But Were Caused by the Wrongful Acts of UMW and of Persons for Whom It Was Legally Responsible

The second question presented by the petition is that responsibility was imposed upon UMW "necessarily" on the basis of "the conduct of union members or of unknown persons and not that of agents or employees of the union and not authorized, participated in or ratified by the union". This was not the theory of liability of the international union pleaded and proved by the plaintiff and was certainly not charged as such in the District Court's instructions to the jury. It is a factual contention of UMW rejected by the jury under careful instructions as to matters of agency and concert of action (R. 715-717).

The argument under this question is prefaced with the complaint that the District Court submitted to the jury and the Court of Appeals approved "the legal proposition that if an employer suffers damages resulting from a strike of his employees and there occurs during the course of this strike unlawful conduct the guilty party becomes liable for all damages resulting from the legal conduct and the illegal conduct". The relationship of this proposition to the question presented is not readily understandable, and the obscurity of reasoning is not relieved in the argument of UMW by reference to any particular part of the District Court's instructions to the jury or holding of the Court of Appeals. It is assumed that the point of the argument is that the employer has recovered damages on account of a legal strike of its employees attended by

some unlawful activity on the part of persons not connected with UMW.

It was a principal contention of UMW that White Oak's employees voluntarily went on strike because their employer refused to sign its amended National Bituminous Coal Wage Agreement. As expressed in the Order Pursuant to Pretrial, UMW contended that "The closure of plaintiff's mine in March, 1959, resulted from the voluntary cessation of work on the part of plaintiff's employees who were members of defendant union and who ceased work for a lawful purpose" (R. 24). Primary reliance as a matter of evidence was placed upon the result of an election among White Oak employees petitioned for by a rival union and held in August, 1959, in which UMW received a majority of the votes. The rights of the defendant with respect to this theory were carefully explained in the instructions to the jury as follows:

> "A union has the right under state law to induce employees by fair persuasion to withhold their services from an employer in order to obtain a collective bargaining agreement.
>
> "By fair persuasion is meant argument, exhortation or entreaty addressed to a person without threat of physical harm.
>
> "A union has the right under state and federal law to induce employees to leave their work and to remain away from their work by paying or by giving such employees strike benefits or other moneys or things of value.
>
> "A union has the right under state and federal law to peacefully picket an employer's premises in order to induce other persons to cease doing business with the employer and to thereby obtain a collective bargaining agreement." (R. 714-715)

This theory of UMW that White Oak's troubles were caused by a voluntary "strike" on the part of its employees is the subject of several adverse comments on the evidence contained on pages 7, 8, 9, and 12 of UMW's petition under "Statement of the Case," and they should be herein noticed.

First, the "confusion" declared by UMW about whether White Oak and its employees intended to work on the morning of March 16, the day after the UMW contract expired, was testified to only by UMW witness James Tidwell, President of the White Oak Local, who said he heard on the radio and saw in the newspaper that White Oak intended to work but claimed that he understood they were to do only painting and repair work (R. 551). Other testimony was to the contrary (R. 346, 410, 406, 378, 381, 355).

The UMW claim that the motorcade which was organized by Prater at a road intersection on White Oak Mountain on the morning of March 16, stopped at White Oak's stripping operation a little while later only because it "missed a turn" in the road is incredible in view of other testimony about what they were up to. "They came back and give me my instructions . . .", testified superintendent Hemsworth (R. 356). "They told us if we wanted to do any painting or repair work, we could do that but not prepare to move any coal", said employee Hatmaker (R. 379-380). They "told the foreman what we could do and what we couldn't do", said employee Carl McNeely (R. 410). No excuse about missing a turn or anything else was given for the same motorcade having stopped later that day at another coal stripping operation and causing it to shut down, telling the foreman that they had already stopped "one of the Ules Arnold's jobs" (R. 326-327).

UMW's statement that most of "the employees and truck drivers testified they had not been asked to return to work" is misleading, the many citations to the record being mostly the testimony of their truck driver witnesses who would not have been contacted directly, but through their employer, and a couple of tipple employees who would not have been needed until after the production employees resumed work. On the other hand, all six former White Oak employees who were asked about the subject testified that they were afraid to work. One of these was a witness for UMW (R. 518).

The Court of Appeals was also criticized for mentioning the "undisputed" evidence that the rival Southern Labor Union had a "reputation as a company-sponsored union". The reference is to the testimony of Prater. UMW witness Tidwell and another former employee of White Oak who had been fired, also testified that Arnold and foreman Hemsworth had shown them a proposed contract with the rival union and tried to interest them in membership. This was categorically denied by both Arnold and Hemsworth (R. 694, 697). Arnold, when cross-examined about whether he had asked a number of his employees to join the rival union, testified that when the men asked him about it he told them he "wasn't allowed to talk to them" and that he "understood (he) didn't have the right to take any part in it" (R. 132).

The last UMW comment on this holding of the Court of Appeals against UMW's contention that the work stoppage was caused by a voluntary strike, is that the Court adopted Arnold's words and "found circumstantial weight in its conclusion that White Oak's employees were 'well satisfied' with their wages and

that, prior to the strike, they did not 'complain' about expiration of the UMW contract". This paragraph in the petition, page 12, ends with the citation to the record of Arnold's testimony, and so does the record in this case about this matter. While several witnesses testified that they were willing to work without a contract, UMW did not undertake to prove by anybody that he was dissatisfied with his wages and working conditions.

It was the theory of White Oak that the work stoppage was caused not by voluntary adherence to UMW by the mining employees, but by fear, illegally induced, that the Union would prevent them by any means necessary from working other than under the National Bituminous Coal Wage Agreement. This fear continued until the time notices were posted by order of the National Labor Relations Board that unlawful interferences with them on the part of the UMW would cease. The evidence was clear from the testimony of the employees themselves, including the only one of defendant's witnesses of whom they inquired about the matter, that the employees quit work and stayed away from work because they were scared of the UMW (R. 205, 331, 347, 395, 406).

In its argument of this Question UMW undertakes to reclassify and restate on pages 23-25 of the petition some of the evidence recited in the opinion of the Court of Appeals. In the case of three of these six items there are certain comments in parenthesis, all of which are untrue or misleading in the light of the record in this case.

Under paragraph numbered 2 on pages 23 and 24 of the petition, UMW mentions a time lapse of three months between certain events. The same point is

mentioned on page 12 of the petition under "Issues". Concerning the connection of UMW Representatives Prater and Daniel with the Jellico tipple destroyed by dynamite on May 6, 1956, the Court of Appeals pointed out that "they were down at the tipples at Jellico about midnight prior to the dynamiting of the Randolph property and referred to the dumping of coal across the sidewalk close to the "Randolph ramp" (A. 12-13). While these facilities at Jellico were used in the preparation and loading of the coal produced by the witness Randolph's Snyder & Randolph Coal Company, they were owned by Gilchrist & Sons and also used for coal produced by its affiliated G & R operation. It is obvious that this paragraph in the opinion referred to dynamiting of the Jellico ramp, tipple and property and not the later destruction of an auger in Whitley County owned by Snyder & Randolph.

The record shows, that within a day or two of the dumping of the Snyder & Randolph coal at the Gilchrist tipple in the presence of Prater and Daniel about midnight March 9th the G & R and Snyder & Randolph mines ceased work under the union pressure and the Jellico tipples were not used again until Snyder & Randolph resumed trucking coal into Jellico three days before the tipples were destroyed by dynamite on May 6th (A. 7, R. 477-8, 220). UMW Field Representative Daniel had told Randolph in March that there would be no more coal loaded over that ramp (R. 219). There was a definite continuity of interference and no lapse of three months as petitioner interpolates. The other parenthetical comment under item 2 is that "a strike was on among Gilchrist's employees at the tipples". This is not true.

Under item 3 concerned with the activity of Prater and Daniel the morning the Gilchrist tipples were blown up, UMW says, "The record is silent as to whether any members were arrested or whether there was any further disposition of the case". This is also not true. UMW member, pensioner and witness, James A. Elliott, testified that he was arrested for this dynamiting on the morning of the occurrence (R. 626). His alibi for the evening was that he was staying all night "up at Branum Hill . . . with a Chambers girl" who "died here a while back" (R. 627).

In item 5 with reference to the status of Hubert Bailey and four other men, petitioner states in parenthesis: "Circuit Court did not refer to fact that these members supervised for their local union the disbursement of $25.00 a week grocery orders to those on strike in the area (R. 460-462, 465)." The record reference is to the testimony of Prater about Bailey, and not about any of the other four, evidently in explanation of the fact that plaintiff's witnesses had testified that UMW funds were used to pay for Bailey's meals and gasoline. The activities of Bailey and the other members of the "overall gang" mentioned were, however, described as much more menacing by plaintiff's witnesses Malcolm Jackson (R. 159-160), Trooper Harold West (R. 167), James Veach (R. 193), Y. B. Stanford (R. 255) and Dave Smitty (R. 369-370). Bailey, Cox, the Bryants and Justice were not among the thirty-four witnesses whose testimony was presented by the UMW.

UMW comments under its statement of facts on page 13 of the petition that the Court of Appeals, in referring to Bailey's statement about the union furnishing them dynamite and Arnold not going back to work,

did not point out that the statement was made "wholly out of context with" the labor dispute. Actually the witness said that he had "brought the subject up about the union" and "how they had been threatening" a man who worked for a little coal mine owned by his father and that it was during this conversation that one of the other men said he had "heard Arnold is going back to work". In addition to Hubert Bailey's threatening statement about Arnold, one of the other men said that he did not like the way a certain man had been talking about the union and that he was going to shoot his windows out that night. The next day the witness noticed that this man's windows had been shot out (R. 193-194). The statements were, therefore, not idle conversation unconnected with the labor dispute.

The legal argument of the petitioner centers upon Section 6 of the Norris-La Guardia Act and the holding of the Court in *Brotherhood of Carpenters and Joiners of America* v. *U. S.*, 330 U.S. 395, and various items of circumstantial evidence are presented as insufficient under the applicable rule. It is argued that the *Brotherhood of Carpenters* case precludes union responsibility "for conduct except upon *clear proof* that it actually authorized, participated in or ratified the specified illegal conduct". This Court, however, said in that case:

> "There is no implication in what we have said that an association or organization in circumstances covered by § 6 must give explicit authority to its officers or agents to violate in a labor controversy the Sherman Act or any other law or to give antecedent approval to any act that its officers may do . . . The grant of authority to an officer of a union to negotiate agreements with em-

> ployers regarding hours, wages, and working conditions may well be sufficient to make the union liable . . . And the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union." 330 U.S. 409-410

In the last part of the argument under this question, petitioner characterizes the evidence in the record pertaining to its liability as an "alternative suspicion", the other suspicion being that the coal company "hard pressed for funds caused by the strike destroyed the equipment to collect the insurance" and evidently inspired some of the other acts that caused its damage. On cross-examination of U. R. Arnold, White Oak's President, UMW elicited testimony that Sheriff Rose Kitts of Campbell County, who appeared on the scene of the dynamiting during the following afternoon had told him that he had a lead on a yellow Cadillac that was seen in the vicinity of the dynamiting the night before and further that Arnold, himself, drove the only Cadillac in the immediate vicinity (R. 128). Arnold also testified on cross-examination that the insurance policy on the equipment that was destroyed had been obtained not "too long" before, but he explained that the Company which had carried the insurance for "quite a while" had cancelled White Oak's coverage and that of other companies because of the "dynamiting and goings on around", and he had obtained such other insurance coverage as he could (R. 129). He had testified on direct examination that he had some insurance but that the insurance company refused to pay the claim for the dynamiting of the equipment. An objection was sustained to a question as to why no payment was made (R. 97). Plaintiff's later witnesses, Highway Patrolman, Bunch, and

Bauer, an agent of the Tennessee Bureau of Criminal Identification, were asked on direct examination about Sheriff Kitts' report on the yellow Cadillac. Trooper Bunch did not seem to know anything except what Sheriff Kitts had told him which was objected to as hearsay, and agent Bauer said that he had followed up the lead as best he could and found a yellow Cadillac parked in front of UMW headquarters in Middlesboro and photographed it on one of three occasions that he saw it there (R. 236). He said it was registered in the name of a Kentucky mine operator. With the record in this shape at the close of the plaintiff's proof as to the Cadillac and the insurance, UMW failed to call Sheriff Kitts as a witness or even bring up either subject again. In the end, there was nothing much of this alternative theory of responsibility for plaintiff's damages for speculation much less for legal consideration.

Reference has been previously made to the fact that the so-called primary activity of the union—coercion of employees in the coal industry—was enjoined by a United States District Court upon the petition of the National Labor Relations Board. It should also be stated in connection with the claim of UMW that it has been held liable without legal precedence for the consequences of both legal and illegal activity that the motorcades could be and probably were found by the jury to be in violation of Tennessee Code, Section 39-2805, making it a criminal offense to "willfully prowl or travel . . . through the country or towns, to the disturbance of the peace . . . or for the purpose of causing, through threats or intimidation or other improper means, any citizen . . . to do or not to do any lawful thing . . ."; and that the stopping of trucks by crowds of pickets was within the prohibition of Section 39-

2303 forbidding any person to obstruct a public or private highway. There was no "interplay of lawful" acts concerning which the union is left to "guess at" its rights and liabilities. The concern of UMW for the shades of difference between lawful and unlawful conduct was not evident in 1959 in Campbell County, Tennessee.

QUESTION NO. 3

The Claim for Violation of the Law of the State of Tennessee Based Upon Wrongful Conduct Also in Violation of Section 303 of the Labor Management Relations Act Is Not Displaced by the Pre-eminence of the National Labor Relations Board and the Federal Law

Under Question 3, the petitioner make a most peculiar argument that "the principles of federal preemption" preclude the federal courts from adjudicating the claim for damages under the state law since "the activity of the subject matter of" this litigation is arguably subject to the protection or prohibition of the National Labor Relations Act. Cases relied on are *Iron Workers Local 207* v. *Perko*, 373 U.S. 701 (1963); *Association of Journeymen* v. *Borden*, 373 U.S. 390 (1963); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); and *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957).

Borden and *Perko* considered actions by union members allegedly wrongly dealt with by their unions.

In *Borden* this Court said:

> "We need not and should not now consider whether the petitioner's activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis. It is sufficient for present purposes to find, as we do, that it is reasonably 'arguable' that the matter comes within the Board's jurisdiction".

In *Perko* there was a similar conclusion:

> "It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We, therefore, conclude that the State must yield jurisdiction and the judgment below must be Reversed."

In the *Garmon* case, of course, the question was whether the California Court had the right to award damages arising out of peaceful picketing activities. It was pointed out that the obligation to pay compensation can be a potent method of controlling policy and governing conduct and that the state must yield to "the primary jurisdiction" of the National Labor Relations Board.

The holding was summarized as follows:

> "Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced."

In *Youngdahl* this court held that the courts of Arkansas had the discretionary power to enjoin future acts of violence, intimidation and threats connected with picketing activity but could not so enjoin peaceful picketing, saying:

> "Though the state court was within its discretionary power in enjoining future acts of violence, intimidation, and threats of violence by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain of the

National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners."

Thus, the doctrine of pre-emption announced in these cases applies to matters such as unfair labor practices which are arguably within the exclusive jurisdiction of the National Labor Relations Board. Relying on these cases, the petitioner insists that the claim for damages in this case based upon violation of state law must yield to the exclusive jurisdiction of the National Labor Relations Board, even though Congress has provided by Section 303 of the Labor Management Relations Act a remedy independent of the Board for substantially the same activity. There is no legal authority or logical basis for such an argument. In previous petitions for certiorari in several similar cases from the Sixth Circuit which are cited in its opinion, UMW has urged, without authority or success, that the federal cause of action for damages supplanted and displaced the claim under state law. Since the denial of the petitions in those cases, this Court in *Smith* v. *Evening News Association*, 371 U.S. 195, held that a suit could be maintained in a Michigan court by an employee against his union for violation of a collective bargaining agreement which was concededly, not merely arguably, an unfair labor practice within the jurisdiction of the NLRB. There was, of course, precedent for this decision in previous opinions dealing with Section 301 of the Labor Management Relations Act. The similarity in this respect of actions under Section 303 such as the instant case and under Section 301 is recognized in a footnote in the *Borden* case and it was there noted that principles different from those announced in *Garmon* were applicable thereto.

Under this question petitioner also relies upon *Morton* v. *Local 20 Teamsters, etc.* 320 F. 2d 505, decided by the Sixth Circuit after this case, and involving also a suit for damages based on a secondary boycott unlawful under Section 303 "as well as being unlawful under the common law of the State of Ohio". In this connection the Court of Appeals is criticized for allowing the claim under state law even though the picketing was peaceful. Whatever might be the real or imagined conflict of this result with the rule in the *Garmon* case, it has nothing to do with the instant case. Although UMW claimed that in all things involving White Oak it was peaceably protecting the interests of its membership, it was respondent's theory, pleaded and proved, that its damages resulted from threats, intimidation and violence. The jury was told by the District Court, in part:

> "You may not find the defendant liable to the plaintiff under the state law unless you find that the defendant engaged in acts of violence in breach of the peace relative to plaintiff's mine and that such conduct damaged plaintiff's property or business, or both." (R. 714)

Thirdly, in answer to the petitioner's vague and superficial argument on this subject, it should be pointed out again that the matters out of which this action arose were, indeed, "left in the first instance to the National Labor Relations Board" as might be required under the *Garmon* principles in other situations; and it cannot be said of this case that the Board "has not adjudicated the status of the conduct" complained of. On the 26th day of March, the month in which the trouble first arose, White Oak and others filed unfair labor practices with the National Labor

Relations Board against UMW (R. 79). On April 30, after due investigation, upon petition of the Regional Director, Ninth Region of the National Labor Relations Board, a temporary restraining order was issued by the U. S. District Court for the Eastern District of Kentucky enjoining District 19 of UMWA and UMWA in the area including White Oak from mass picketing, blocking roads, intimidating and in any other manner restraining or coercing employees in the exercise of their rights (R. 92). This proceeding ended in March of the following year by the posting of notices by the UMW under an enforcement order of the Sixth Circuit in the NLRB proceedings which was dealt with at some length in the opinion of the Court of Appeals in this case. Of course, it is specifically provided by the Labor Management Relations Act that both the courts and the Board shall have jurisdiction over acts which amount to a secondary boycott. Moreover, if, in the words of the *Evening News Association* case, there may be "situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice", this case is certainly not one of these situations.

QUESTION NO. 4

Under the Doctrine of Pendent Jurisdiction the District Court Was Empowered to Entertain the Claim for Violation of the Law of the State of Tennessee Along With the Claim for Damages Under the Labor Management Relations Act

The fourth question set forth in the petition embraces the familiar argument against the application of the doctrine of pendent jurisdiction which UMW insists was not properly disposed of by the Circuit Court of Appeals. The Sixth Circuit has written on

this subject in *United Mine Workers of America* v. *Meadow Creek Coal Company*, 263 F. 2d 52 (C.A. 6) (cert. denied 359 U.S. 1013); *United Mine Workers of America* v. *Osborne Mining Company*, 279 F. 2d 716 (C.A. 6) (cert. denied 364 U.S. 881); and in *Flame Coal Company* v. *United Mine Workers of America*, 303 F. 2d 39 (C.A. 6) (cert denied 371 U.S. 891), and the matter has been extensively briefed on petitions for certiorari to this court in those cases and in the case of *Gilchrist* v. *United Mine Workers of America*, 290 F. 2d 36 (C.A. 6) (cert. denied 368 U.S. 875).

As stated in its brief in the Court of Appeals, UMW has attempted to confront the injured parties in these cases with "an unanswerable dilemma: If the two causes of action are based upon the same facts, then the Federal Law has pre-empted the field and thereby the State cause of action must fall. If they are not based upon the same facts, then the District Court did not have jurisdiction over the State cause of action". If the facts of this case were as set forth by the petitioner under this and other headings, the case of the respondent would have failed on much less technical grounds. The truth is that the UMW moved on all fronts against the trucking and mining of coal in the entire area, indiscriminately violating both federal and state law. It was on the highways traveled by the secondary employees that most of the incidents of interference and intimidation occurred.

There should be no question now of the applicability of the doctrine of pendent jurisdiction under the holdings of the previous similar cases and those of this Court. Petitioner has offered nothing new on the subject; there is nothing more to be said.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT S. YOUNG, JR.
HOWARD H. BAKER, JR.
1000 Burwell Building
Knoxville, Tennessee
Counsel for the Respondent

TABLE OF CASES

	Page
Chauffeurs Local 175 v. NLRB, 294 F. 2d 261, 262, C.A., D.C.)	3
International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corporation, 342 U.S. 237 (1952)	5
Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93 (1958)	6
Morton v. Local 20, Teamsters, Chauffeurs and Helpers Union, 320 F. 2d 503 (6 Cir. 1963)	1
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	2
Smith v. Evening News Association, 371 U.S. 195 (1963)	4
United Automobile Workers v. Russell, 356 U.S. 634 (1958)	2
United Construction Workers v. Laburnum Corp., 347 U.S. 656 (1954)	2

STATUTES

Labor-Management Relations Act, 1947:

Section 301	4
Section 303	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 556

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WHITE OAK COAL COMPANY, INC.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

After UMW filed its petition for certiorari in the instant case, this Court, on December 9, 1963, granted certiorari in *Morton* v. *Local 20, Teamsters, Chauffeurs and Helpers Union*, 320 F. 2d 505 (6th Cir. 1963).

Morton, like *White Oak*, was based upon application of state tort law, and, like *White Oak*, it involved questions of preemption and pendant jurisdiction. The Sixth Circuit, in giving full play to state law in *Morton* expressly relied upon its prior decision in the instant case.

We have fully discussed the *Morton* decision at pages 33 and 34 of our petition. As we there state it represents, as does *White Oak*, a practical rejection of the preemption principle, or, at the very least, an imperfect understanding of the problem.

The significant role state law plays in actions for damages against labor unions emphasizes the public importance of the Sixth Circuit decisions in both the *Morton* and *White Oak* cases. There is need to know just how far courts go in applying state law in these controversies.[1] This Court will not be presented with an opportunity to consider the entire problem or a major part of the problem in its review of *Morton*. Morton does not involve even an allegation of violence. Indeed, as we think, the Sixth Circuit's application of state law in *Morton* is wrong for reasons already discussed by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The instant case, however, does involve, among many other things, acts of violence. This Court's decisions in *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656 (1954) and *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) hold that state law is not preempted in matters of state interest involving a breach of the peace. But as we have shown in our discussion of Question No. 3 (pp. 30-35) the instant case was decided on the theory that the acts of violence corrupted UMW's entire course of conduct, and authorized a judgment for White Oak for the "total

[1] State law was applied in both *Morton* and *White Oak* on the theory that the District Court had ancillary or pendant jurisdiction of the state law claim. This question, which goes hand in hand with the question of the extent of permissible application of state law, has not been considered in a labor context by this Court.

damages sustained" during the dispute for acts "legal and illegal". This holding, we insist, is in conflict with the *Garmon* decision certainly to the extent it makes the consequences of federally protected acts the basis for damages under state law.

The Sixth Circuit decision that certain illegal acts—the responsibility for which is challenged—makes all of UMW's acts illegal, including all lawful inducements to employees to remain away from work and to vote for UMW in the NLRB election, and is assuredly in conflict with the reasoning of the Court of Appeals for the District of Columbia. The "totality of effort rule" was considered and rejected by that Court in *Chauffeurs Local 175* v. *NLRB*, 294 F. 2d 261, 262 (C.A., D.C.), stating:

> "But peaceful primary picketing and its normal incidents, including requests to neutrals not to cross the picket line, cannot be forbidden though the union has acted illegally elsewhere."

It is manifest that this case, alone or in conjunction with *Morton*, presents a notable opportunity to consider a problem of recurrent and increasing public importance.

II

White Oak contends (p. 27) there is no "legal authority or logical basis" for UMW's argument on preemption, insisting that state law does not yield to NLRB jurisdiction because Congress, by Section 303, Labor Management Relations Act of 1947 [29 USCA 187], devised a remedy for "substantially the same activity".

White Oak's argument not only seems fallacious, it reflects the basic misconception of the preemption

problem in the Sixth Circuit's decisions in *Morton* and the instant case. Obviously, the enactment of Section 303 was only a part of the federal scheme of regulation, which, as this Court has long since found, largely preempts the field insofar as application of state law is concerned. That Congress believed it necessary in Sections 301 and 303 to provide for suits for damages in certain instances, is no basis whatsoever to find an intention to permit application of state law, as the *Garmon* decision clearly shows.

The reliance by White Oak on *Smith* v. *Evening News Association*, 371 U.S. 195 (1963) is particularly inapposite. *Smith* does not allow for the application of state law. It is the other way around. In *Smith* a defense based upon preemption was disallowed on the theory that the claim involved was to be determined on its merits under federal law. And the possibility of conflict this Court referred to in *Smith* between the NLRB and court consideration of the same acts had to do with conflict in the application of federal law. It had nothing to do with the applicability of state law, or the possibility of conflict in concurrent application of state and federal law.

In further answer to UMW's preemption argument White Oak points out (pp. 28-29) that it did in fact invoke NLRB's jurisdiction with regard to the matters here complained of and obtained relief. White Oak apparently contends that it thereby discharged any obligation it had to submit the matter in the first instance to the Board and was thus free to maintain its action for damages. If this is the contention, White Oak has surely devised a novel twist to the preemption theory for heretofore it has been believed that in some matters the Board's jurisdiction was exclusive and in others it was not, but that in no instance was Board

action a prerequisite or an enabling step to an action for damages. Cf. *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corporation*, 342 U.S. 237 (1952).

III

UMW believes answers to White Oak's arguments of Questions No. 1 and 2 are to be found in the petition. These additional comments, however, may be helpful to the Court.

In considering the Sixth Circuit's finding of secondary boycott, it should be remembered that the only evidence of interference with truckers hauling White Oak coal occurred while the UMW contract was still in effect and while UMW members employed by White Oak were still at work. These acts of interference, which occurred in the week preceding the strike, were two in number, the first occurring at the White Oak tipple entrance and the second on a road some distance from the tipple. Involved were persons unknown. Some days later the strike commenced. On the day it began no "secondary" employees were scheduled to work, and of course there was no inducement of secondary employees on that day. Thereafter White Oak remained closed, and, in the words of its own superintendent, it was never able during the strike to get enough of the employees (virtually all of whom were then participating in union meetings and accepting union aid) to operate the White Oak mines (R. 362; see Petition pp. 8-9). In short, there was never any mining of coal after the start of the strike which would have warranted the use of secondary employees.

With this in mind, we turn to the Sixth Circuit's order on the petition to rehear which White Oak

insists we have misconstrued. From a reading of the order it is obvious that the Court was referring to those acts of interference which occurred prior to the start of the strike. It seems evident to us that the Court deemed these acts of interference prior to the start of the strike as "incidental and permissible". If the Court did not mean by this language that it did not rely upon acts other than those which occurred prior to the start of the strike to support its finding of the secondary boycott, one can only wonder why the Court went to the trouble of modifying its opinion.

It seems clear that the Sixth Circuit predicted its finding of secondary boycott on something besides these "incidental" acts which occurred prior to contract expiration. This being so the Court of necessity had in mind acts which occurred during the strike while White Oak did not have secondary employees scheduled to work. The Sixth Circuit's theory of spectacular violence thus is that because of violence elsewhere White Oak couldn't have employed secondary employees to haul its coal even had its regular employees been willing to mine coal and even had the secondary employees been asked to haul.

Considering that the prohibition of Section 303 was "narrowly conceived" and that the statute becomes applicable only when a union indulges in "specifically prohibited means of coercion through inducement of employees", it is manifest that a boycott of the type condemned was not established by the evidence. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 US 93 (1958).

IV

No useful purpose would be served in the present posture of the case to discuss the many tortured state-

ments of fact contained in *White Oak's* brief. The brief cannot obscure the fact that UMW, through lawful means induced union action by union members which resulted in affirmation of UMW's status as bargaining representative of White Oak employees. Nor can it obscure, in dwelling upon acts of violence which unfortunately occurred in this dispute which involved thousands of coal miners in the Southern Appalachian Mountain country, that UMW stands cast in judgment for the acts of persons absolutely unknown. The fact is, as we point out in our discussion of Question No. 3, the questions of agency and union participation and authorization involved in this case of necessity were decided on the basis of guess work. There can be no answer, and White Oak offers none, to the insufficiency of evidence on this aspect of the judgment.

Respectfully submitted,

E. H. Rayson
R. R. Kramer
904 Burwell Building
Knoxville, Tennessee

Willard P. Owens
900 Fifteenth Street, N.W.
Washington, D. C.

Counsel for Petitioner

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 28 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 556

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WHITE OAK COAL COMPANY, INC.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

WILLARD P. OWENS
900 Fifteenth St., N. W.
Washington, D. C.

E. H. RAYSON
R. R. KRAMER
904 Burwell Building
Knoxville, Tennessee

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 556

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WHITE OAK COAL COMPANY, INC.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, United Mine Workers of America, prays that this Court grant rehearing of its order of January 6, 1964, denying the petition for writ of certiorari, — U. S. —, 32 LW 3239, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in the above-entitled case as prayed in its petition filed October 15, 1963, herein.

Reasons for Granting Rehearing and Issuing the Writ

This Court granted certiorari on December 9, 1963, to review Sixth Circuit rulings adverse to the petitioning union in *Morton* v. *Local 20, Teamsters, etc.*, 6 Cir., 320 F. 2d 505, wherein the Questions Presented by Teamsters are:

"(1) Does federal preemption doctrine bar federal district court from exercising pendent jurisdiction to award actual and punitive damages based upon alleged violations of state common law, where such violations do not arise under Section 303 of Taft Act, and where preemption doctrine bars state courts from awarding either actual or punitive damages;"

"(2) Does Section 303 of Taft Act authorize award of total actual damages for injury resulting directly from lawful primary strike merely because union also engaged in other conduct that was found to violate Section 303."

The Sixth Circuit (320 F. 2d 506-7) relied in part upon UMW's instant *White Oak* case to support its rejection of Teamsters' contentions in the issues covered in the above-quoted Questions Presented. Similar questions,[1] involving identical issues presented by

[1] In UMW's Petition for Certiorari in the instant case, Questions 3 and 4 read thus:

"3. In a suit for damages under state law by an employer against a labor union, is a court empowered, notwithstanding the principles of federal preemption, to render judgment against the union for compensatory damages based upon the total loss sustained by the employer by reason of an economic strike of his employees, and for punitive damages, merely because violence and disorder for which the union is held responsible occurs during its course, where it affirmatively appears that the union is bargaining agent of the employees involved and that the employer's inability to operate and consequent losses were the result of primary union activity to obtain a union contract?"

"4. In an action for damages against a labor union in which plaintiff contends certain acts which occurred during a labor dispute constituted a violation of Section 303 of the Act and that the union's entire course of conduct during the dispute constituted a violation of state common and statute law, was the District Court empowered under the theory of ancillary or pendant jurisdiction, to determine the non-federal claim?"

UMW in the instant *White Oak* case were rejected for review by this Court on January 6, 1964.

Two days later (January 8, 1964), in an action involving, among others, issues identical to those to be answered in *Morton*, and styled *R. P. Price, et al.* v. *United Mine Workers of America*, No. 15,046,[2] the Sixth Circuit obviously concerned as to the correctness of its *Morton* rulings, based in part upon *White Oak*, deferred further consideration "to await the decision of the Supreme Court in the *Morton* case".[3]

Thus, *White Oak*, *Morton* and *Price* are legal equivalents, at least so far as the issues within the scope of the Questions Presented in *Morton* are concerned. The concern of whether *Morton* was correctly decided, which prompted the Sixth Circuit to defer consideration in *Price*, should attend this Court's reconsideration of UMW's petition for certiorari in *White Oak* and prompt its vacation of the order denying certiorari therein.

The Court's acceptance of the Questions Presented in *Morton* bespeaks its belief in the importance of the issues to be reviewed. In the absence of this Court's vacating the denial order in *White Oak*, UMW is confronted with satisfying an enormous money judgment ($310,000.00). It has no alternative. If, thereafter, this Court's answers in *Morton* show the Sixth Circuit erred in *White Oak*, procedural remedies would then have been foreclosed and UMW could find no consola-

---

[2] In the Sixth Circuit's *Price* case, Questions Eight, Nine and Twelve concern the issues to be answered in *Morton*. These questions appear in Appendix B herein.

[3] The Sixth Circuit's deferral order appears herein as Appendix A.

tion in the knowledge that it had been correct in the principles urged by it. Clearly, in the light of review granted in *Morton*, manifest justice calls for vacating the order denying certiorari and entry of an order awarding the writ prayed for or, in the alternative, postponement of final action on the petition pending *Morton's* disposition.

Respectfully submitted,

WILLARD P. OWENS
900 Fifteenth St., N. W.
Washington, D. C.

E. H. RAYSON
R. R. KRAMER
904 Burwell Building
Knoxville, Tennessee

Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

WILLARD P. OWENS
Counsel for Petitioner

APPENDIX A

Filed January 8, 1964

No. 15,046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

R. P. PRICE, ET AL., *Plaintiffs-Appellees*,

vs.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant*.

Order

Before: WEICK and O'SULLIVAN, Circuit Judges, and PRETTYMAN, Senior Circuit Judge.

Subsequent to the oral argument in the above case the Supreme Court granted certiorari in the case of *Local 20, Teamsters, Chauffeurs and Helpers Union No. 485 vs. Lester Morton* which may control some of the issues in the case at bar.

IT IS, THEREFORE, ORDERED that further consideration of the case be postponed to await the decision of the Supreme Court in the *Morton* case.

PAUL C. WEICK
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

R. P. PRICE ET AL

v.

UNITED MINE WORKERS OF AMERICA

No. 15,046

Question Eight

Are punitive damages recoverable against a labor union in an action brought under Section 303, Labor Management Relations Act, 1947?

The trial court, in refusing UMW's instruction No. 17 and in overruling its motion for judgment or a new trial, answered this question "Yes". Appellant contends it should be answered "No".

Questio Nine

Under the doctrine of federal preemption, was the district court without power, authority and jurisdiction to approve a jury verdict of punitive damages?

The trial court, in refusing UMW's Instruction No. 17, and in overruling its motion for a new trial, answered this question "No". Appellant contends it should be answered "Yes".

. . . . . .

Question Twelve

In an action instituted in a federal district court by an employer against an unincorporated labor union in its common name for damages and the district court's jurisdiction is asserted under Section 303, Labor-Management Relations Act, 1947, and there is no diversity of citizenship of the parties (a) does the district court have jurisdiction, power and authority over the subject matter and the union under the doctrine of pendent or ancillary jurisdiction to determine the issues in a non-federal tort action joined with a claim under said section, where state courts in the

state in which the alleged wrongful conduct occurred and wherein the federal district court is sitting would not entertain jurisdiction of a suit based upon the non-federal claim against the union in its common name; and (b) does the doctrine of federal preemption preclude the applicability of the pendent or ancillary jurisdiction in such action?

The trial court answered the (a) portion of the question "Yes", which appellant asserts it should have answered "No"; and it answered the (b) portion of the question "No", and appellant asserts the answer should be "Yes".